Supreme Court of the United States

OCTOBER TERM, 1969

No. 265

GLADYS BODDIE ET AL.,

Appellants,

—v.—

CONNECTICUT ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

INDEX

	Page
Record from the United States District Court for the District of Connecticut	
Docket entries	2
Motion to proceed in forma pauperis and order allowing	6
Complaint	8
Exhibit A—Financial Affidavits of Gladys G. Boddie, Ann DeNicola, Mary Ann Dozier, Mary Wierzbicki, Mamie Williams, Catherine Strain, Bertha Barker, Mary Yeaton and Betty Ann Perez	11
Motion for order that this action is maintainable as a class action	29
Summons with Marshal's Return thereon (omitted in printing)	30

Page

Record from the United States District Court for the District of Connecticut—Continued

Appearance of Arthur B. LaFrance (omitted in printing) 30

Designation of judges 31

Notice of motion and motion to file brief and make oral argument as amicus curaie with endorsement thereon 32

Certificate of Service of New Haven Civil Liberties Counsel (omitted in printing) 33

Appearance of Raymond J. Cannon (omitted in printing) 33

Appearance of Edward J. Peters, Jr. (omitted in printing) 33

Motion to extend the time to file a pleading with endorsement thereon (omitted in printing) 33

Appearance of Jack Greenberg, Leroy D. Clark and Philip G. Schrag (omitted in printing) 33

Amendment to complaint 34

Motion to dismiss and notice of motion 35

Memorandum of Decision on Motion to Dismiss, Smith, J. 37

Judgment, July 17, 1968 47

Notice of appeal to the Supreme Court of the United States 48

Clerk's certificate (omitted in printing) 49

Order granting motion for leave to proceed in forma pauperis 49

Order noting probable jurisdiction 50

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civil Docket 12513

3-JUDGE COURT

HON. J. JOSEPH SMITH, U.S.C.J.
HON. M. JOSEPH BLUMENFELD, U.S.D.J.
HON. T. EMMET CLARIE, U.S.D.J.

Jury demand date:

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, CATHERINE STRAIN, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated

v.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut

Of Counsel (For: Plaintiffs)
JACK GREENBERG
LEROY D. CLARK
PHILIP G. SCHRAG
Suite 2030
?0 Columbus Circle
New York, N. Y. 10019

For plaintiff:

ARTHUR B. LAFRANCE, New Haven Legal Assistance Assn., Inc., 768 Grand Avenue, New Haven, Conn.

Of Counsel:

JOSEPH M. SHORTALL (Same address as above).

SAMUEL W. BOWLBY (For: Civil Liberties Council), 205 Church St., P. O. Box 1936, New Haven, Conn. 06509

* See below

For all defendants:

ROBERT K. KILLIAN, Atty. General, RAYMOND J. CANNON, Asst. Atty. General, 30 Trinity Street, Hartford, Conn. 06115

EDWARD J. PETERS, JR., Assistant Attorney General.

Basis of Action: Action for Declaratory Judgment that the practices and statute 52 C.G.S.A., Sec. 257 (as modified by P.A. 89 of the 1967 Legislature) requiring payment of court fees and expenses is unconstitutional when applied to indigent plaintiffs; and for an injunction. Also requests 3-Judge Court.

DATE	PROCEEDINGS
1968	
4/20	Motion to Proceed in Forma Pauperis, filed by Plaintiffs. Order entered granting same. Blumenfeld, J. M-4/22/68 Copy mailed Atty LaFrance.
"	Complaint with attached affidavits, and Request for a 3-Judge Court pursuant to 28 U.S.C. Sec. 2281, et seq., filed.
"	Motion for Order that this Action is Maintainable as Class Action, filed by Plaintiffs.
"	Referred to Judge Blumenfeld.
4/23	Summons issued and together with copies of same and of Complaint, Motions and Order, handed to the Marshal for service.
4/26	Appearance of Arthur B. LaFrance entered for Plaintiffs.

DATE	PROCEEDINGS
1968	
4/30	Designation Of Judges, filed. The following judges, in addition to *Honorable M. Joseph Blumenfeld,* are designated to hear and determine said cause as provided by law: *Honorable J. Joseph Smith,* U. S. Circuit Judge, and Honorable *T. Emmet Clarie,* U. S. U. S. District Judge. IT IS HEREBY ORDERED that this order be filed in the above entitled cause in the said District Court. J. Edward Lumbard. C.J., U.S.Ct of Appeals, 2nd Circuit. M-4/30/68.
5/ 1	Three Folders, containing copies of all documents in this action (including docket entries) mailed to Judges Smith, Clarie and Blumenfeld, for their information.
"	Copies of Designation of Judges mailed to all three Judges, and Attorneys La France, and Shortell.
5/ 2	Motion To File Brief And Make Oral Argument As Amicus Curiae, and Notice of Motion, filed by Attorney Samuel W. Bowlby, for New Haven Civil Liberties Council.
5/ 4	Brief, filed by Plaintiffs. Copies mailed to 3 Judges.
5/ 6	Marshal's return showing service, filed (4) Summons and Complaint.
"	Three Folders mailed to respective Judges, after receipt of Marshal's Returns.
5/ 7	Certificate Of Service on Motion to File Brief and Make Oral Argument as Amicus Cruiae, filed by Attorney for New Haven Civil Liberties Council. Copies of Certificate of Service mailed to three Judges.
5/ 8	Appearance of Robert K. Killian, Attorney General and Raymond J. Cannon, Assistant Attorney General, entered for defendants State of Connecticut; Edward Horwitz, Clerk of the Superior Court of Conn. for New Haven County; Judge Joseph S. Longo, Superior Court of Conn.; and Justice John P. Cotter, Court Administrator, Supreme Court of Conn. Copies mailed to three Judges.

DATE	PROCEEDINGS
1968	
5/13	Hearing on Motion of New Haven Civil Liberties Council to File Brief and Make Oral Argument as Amicus Curiae. "Permission to file a brief as amicus curiae granted. Permission to make oral argument denied." Blumenfeld, J. Copies mailed Attys LaFrance, Atty Bowlby and State's Attorney. Copies to three Judges.
"	Appearance of Robert K. Killian, Attorney General, and Edward J. Peters, Jr., Assistant Attorney General, entered for defendants. Copies mailed 3 Judges
5/17	Motion to Extend Time (to and including June 10, 1968) to file a pleading, filed by Defendants. Copies mailed three Judges.
5/31	Order entered on Defendants' Motion to Extend the Time to File a Pleading, as follows: "Motion granted. The time for the defendants to plead is enlarged to June 10, 1968." Blumenfeld, J. M-5/31/68 Copies mailed to all counsel and to three Judges.
5/31	Endorsement entered on Motion To Extend The Time To File A Pleading, as follows: "Motion granted. The time for the defendants to plead is enlarged to June 10, 1968." Blumenfeld, J. M-6/3/68. Copies mailed to Attorneys LaFrance, Shortall, Bowlby, Killian, & to 3 Judges.
6/ 7	Appearance of Jack Greenberg, Leroy D. Clark and Philip G. Schrag, as of counsel for the plaintiffs, entered. Copies mailed 3 Judges.
"	Amendment to Complaint, filed. Copies mailed 3 Judges.
6/10	Motion to Dismiss and Notice of Motion, filed by Defendants. Copies to 3 Judges.
"	Brief in Support of Defendants' Motion for Dismissal, filed.

DATE	PROCEEDINGS
1968	
6/17	Copy of Memorandum Of Decision On Application Of Mable Davis Seeking Permission To Proceed in Forma Pauperis, (Opinion of Judge Healey of Connecticut Superior Court) filed by Plaintiff's Attorney for information purposes, in this case. One copy each mailed to Judges Smith, Blumenfeld and Clarie.
6/18	Memorandum of New Haven Civil Liberties Council, Amicus Curiae, In Response to Defendants' Motion to Dismiss, filed. Copies mailed to Three Judges.
6/20	Reply Brief of Plaintiffs, filed. Copies mailed three Judges.
6/24	Plaintiffs' Supplemental Memorandum re: Judicial Immunity from Suit, filed by Plaintiffs at Hartford. Copies handed 3 Judges.
"	Hearing on Defendants' Motion to Dismiss. Motion to Dismiss granted as to State of Conn. Decision Reserved. Smith, U.S.C.J.; Blumenfeld, U.S.D.J.; Clarie, U.S.D.J.
7/17	Memorandum of Decision on Motion to Dismiss, entered. Motion granted. Complaint dismissed. Judgment may enter dismissing the action. No further order is necessary. Smith, U.S.C.J.; Blumenfeld, U.S.D.J.; Clarie, U.S.D.J. M-7/17/68 Copies mailed to three Judges. Copies mailed to all counsel.
7/17	Judgment entered that plaintiffs take nothing and that the action be and it is hereby dismissed. Earl, C. M-7/18/68 Copies mailed to 3 Judges; to all counsel.
9/12	Notice of Appeal to the Supreme Court of the United States, filed by plaintiffs (except for Catherine Strain). Copies mailed Atty General; copies returned to Plaintiffs' attorneys.
9/27	Court Reporter's Notes of Proceedings of June 24, 1968, filed at Hartford. Sanders, R.
10/21	Affidavit of Helen Pigott, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Docket No. 12513

April 15, 1968

[File Endorsement Omitted in Printing]

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, CATHERINE STRAIN, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated, PLAINTIFFS

vs.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut, DEFENDANTS

MOTION TO PROCEED IN FORMA PAUPERIS—
Filed April 20, 1968

Affiants hereby move this Court for permission to proceed *in forma pauperis*, respectfully representing, as to each affiant, that:

1. She is unable to pay the fees, costs and security incident to a proceeding in this Court (see financial affidavit attached as Exhibit "A" to the Complaint);
2. This action is one in which each affiant seeks a declaratory judgment and injunction because of the action by the State of Connecticut denying her application to prosecute a divorce action without payment of fees and costs;

3. She believes she is entitled to redress.

/s/ Gladys G. Boddie (L.S.) /s/ Mamie Williams (L.S.)
/s/ Betty Perez (L.S.) /s/ Catherine Strain (L.S.)
/s/ Maryann Dozier (L.S.) /s/ Bertha Barker (L.S.)
/s/ Ann De Nicola (L.S.) /s/ Mary R. Yeaton (L.S.)
/s/ Mary Wierzbicki (L.S.)

COUNTY OF NEW HAVEN)
) ss: New Haven Conn.
STATE OF CONNECTICUT) April 16, 1968

BEFORE ME this day personally appeared GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, CATHERINE STRAIN, MARY WIERZBICKI, MAMIE WILLIAMS and MARY YEATON, known to me and known by me to be the persons who executed the above and foregoing affidavit and they acknowledged before me that they executed the same for the purposes therein expressed.

/s/ Ann J. Oppel
Notary Public
My Commission Expires
April 1, 1973

[SEAL]

ORDER

The foregoing Motion having been submitted to the Court, and good cause appearing therefor, on the basis of the finincial affidavits filed it is hereby

ORDERED, that plaintiffs be permitted to proceed *in forma pauperis* in this Court.

DATED this 19th day of April, 1968.

BY THE COURT

/s/ M. Joseph Blumenfeld
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Docket No. Civil 12,513

April 15, 1968

[File Endorsement Omitted in Printing]

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, CATHERINE STRAIN, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated, PLAINTIFFS

vs.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut, DEFENDANTS

COMPLAINT—Filed April 20, 1968

1. This is an action for a declaratory judgment and injunction preventing the defendants from interfering with the plaintiffs' rights to equal protection and due process of laws under the Fourteenth Amendment to the United States Constitution; and the jurisdiction of this Court is invoked under 28 U.S.C., sections 1343(3), 2201, 2202 and 42 U.S.C., sections 1981, 1983, and 1988.

2. On March 13, 1968, the named plaintiffs applied to the Superior Court for New Haven County, asking that court to allow them to prosecute divorce proceedings without payment of filing or service fees, and, in support of their applications, they submitted divorce writs and financial affidavits (the affidavits submitted to the Superior Court are attached hereto as Exhibit "A" and incorporated herein by reference).

3. On March 14, 1968, defendant Edward Horwitz, Clerk of the Superior Court for New Haven County, rejected the applications and accompanying papers, on

the ground that he could not accept them until an entry fee had been paid.

4. On April 2, 1968, defendant Judge Joseph S. Longo, Superior Court Judge for the Family Relations Session of the Superior Court for New Haven County, and defendant Justice John P. Cotter, of the Connecticut Supreme Court, the Administrator for the Connecticut court system, both declined to grant the applications or allow the papers to be filed.

5. Court costs and expenses incident to a divorce proceeding normally are in excess of sixty dollars, since the entry fee required by 52 C.G.S., section 259 (as modified by P.A. 628 of the 1967 Legislature) is forty-five dollars; service by a sheriff is usually ten to fifteen dollars; service by publication may exceed one hundred dollars and service of subpoenas may be ten dollars each.

6. Each of the named plaintiffs is unable to pay the filing fees and costs of a divorce proceeding, since each is a recipient of welfare assistance from the State of Connecticut, which does not include an allowance for legal fees in its welfare allotments (see financial affidavits in Exhibit "A").

7. The named plaintiffs have therefore been denied access to the Courts of Connecticut solely because of inability to pay court fees and expenses, and have therefore been denied due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

8. The named plaintiffs represent those persons similarly situated, who constitute a class encompassing those women in the State of Connecticut receiving welfare assistance from the State and who wish to obtain a divorce, but are barred from the Courts because of inability to pay the court fees and costs incident to a divorce proceeding; which class has a continuing existence, shares questions of law common to the class, and is too numerous to join in this proceeding.

WHEREFORE, plaintiffs pray this Court to:

(1) Convene a three judge court pursuant to 28 U.S.C., section 2281, et seq., to hear and determine this case;

(2) Declare the practice and the statute, 52 C.G.S.A. section 257 (as modified by P.A. 89 of the 1967 Legislature), requiring payment of court fees and expenses as a condition precedent to obtaining court relief as unconstitutional when applied to these indigent plaintiffs and all other members of the class which they represent;

(3) Enter a permanent injunction against defendants requiring them to:

(a) Accept for filing, without payment of fees and costs, the papers attached as Exhibit "A";
(b) Permit the named plaintiffs to proceed with their divorce actions without payment of fees and costs;
(c) Effect all necessary service and notice incident to the divorce actions without payment of fees and costs by the named plaintiffs;
(d) Take similar action with respect to future divorce proceedings initiated by other members of the class represented by the named plaintiffs.

THE DEFENDANTS

By /s/ Arthur B. LaFrance
Their Attorney

Of Counsel:

/s/ Joseph M. Shortall ABL

EXHIBIT "A" TO COMPLAINT

SUPERIOR COURT, NEW HAVEN COUNTY

March 11, 1968

No.

GLADYS BODDIE

vs.

JOHN LEE BODDIE

FINANCIAL AFFIDAVIT

Affiant hereby respectfully represents that:

1. She is the plaintiff in the above-captioned proceeding.

2. Her income consists solely of an allotment received from the Department of Welfare, State of Connecticut, totalling $361.50 per month.

3. On the above income she supports herself and six children.

4. The normal monthly expenses incurred for herself and her children are as follows:

	$141.00	
Food	100.00	
Rent	26.00	
Utilities	50.00	
Clothing	5.00	
Laundry	10.00	
Household	10.00	
Transportation	12.00	
Entertainment	8.00	
Education	5.00	water bill
Miscellaneous		
Total	$367.00	

5. She has no assets or property other than personal items, such as clothing or jewelry, and necessary household furniture, all with an approximate value of $600.00.

6. Her welfare benefits from the State of Connecticut do not include an allotment for legal and court fees.

7. She has no income, property or assets from which she can afford to pay the fees, costs, expenses and security in the proceeding.

8. Her attorney is serving without fee in this case.

/s/ Gladys G. Boddie [SEAL]

Sworn to and subscribed before me this 27 day of February, 1968.

/s/ Ann J. Oppel
Notary Public
My Commission Expires
April 1, 1973

EXHIBIT "A" TO COMPLAINT

SUPERIOR COURT, NEW HAVEN COUNTY

March 11, 1968

No.

ANN DE NICOLA

vs.

JULIO DE NICOLA

FINANCIAL AFFIDAVIT

Affiant hereby respectfully represents that:

1. She is the plaintiff in the above-captioned proceeding.
2. Her income consists solely of an allotment received from the Department of Welfare, State of Connecticut, totalling $100.00 per month.
3. On the above income she supports herself and 1 children.
4. The normal monthly expenses incurred for herself and her children are as follows:

Food	$ 60.00
Rent	70.00
Utilities	16.90
Clothing	15.00
Laundry	—
Household	3.00
Transportation	—
Entertainment	—
Education	—
Miscellaneous	16.00
Total	$180.90

5. She has no assets or property other than $80.00 monthly from 1st husb. for son's support, personal items,

such as clothing or jewelry, and necessary household furniture, all with an approximate value of $300.00.

6. Her welfare benefits from the State of Connecticut do not include an allotment for legal and court fees.

7. She has no income, property or assets from which she can afford to pay the fees, costs, expenses and security in the proceeding.

8. Her attorney is serving without fee in this case.

/s/ Ann De Nicola [SEAL]

Sworn to and subscribed before me this 4th day of March, 1968.

/s/ Ann J. Oppel
Notary Public

My Commission Expires:
4/1/73

EXHIBIT "A" TO COMPLAINT

SUPERIOR COURT, NEW HAVEN COUNTY

March 11, 1968

No.

MARYANN DOZIER

vs.

SAMUEL DOZIER

FINANCIAL AFFIDAVIT

Affiant hereby respectfully represents that:

1. She is the plaintiff in the above-captioned proceeding.
2. Her income consists solely of an allotment received from the Department of Welfare, State of Connecticut, totalling $240.00 per month.
3. On the above income she supports herself and three children.
4. The normal monthly expenses incurred for herself and her chaldren are as follows:

Food	$100.00
Rent	126.00
Utilities	—
Clothing	10.00
Laundry	2.00
Household	2.00
Transportation	—
Entertainment	—
Education	—
Miscellaneous	—
Total	$240.00

5. She has no assets or property other than personal items, such as clothing or jewelry, and necessary household furniture, all with an approximate value of $159.50.

6. Her welfare benefits from the State of Connecticut do not include an allotment for legal and court fees.

7. She has no income, property or assets from which she can afford to pay the fees, costs, expenses and security in the proceeding.

8. Her attorney is serving without fee in this case.

/s/ Maryann Dozier [SEAL]

Sworn to and subscribed before me this 5th day of March, 1968.

/s/ Arthur B. LaFrance
Commissioner of the
Superior Court

EXHIBIT "A" TO COMPLAINT

SUPERIOR COURT, NEW HAVEN COUNTY

March 11, 1968

No.

MARY WIERZBICKI

vs.

EDWARD JAMES WIERZBICKI

FINANCIAL AFFIDAVIT

Affiant hereby respectfully represents that:

1. She is the plaintiff in the above-captioned proceeding.
2. Her income consists solely of an allotment received from the Department of Welfare, State of Connecticut, totalling $66.16 per month.
3. On the above income she supports herself and children.
4. The normal monthly expenses incurred for herself and her children are as follows:

Food		$28.00	
Rent		85.00	welfare pays
Utilities		14.00	
Clothing		2.00	
Laundry		—	
Household		2.00	
Transportation		2.00	
Entertainment		—	
Education		—	
Miscellaneous		20.00	
	Total	$68.00	Excluding Rent

5. She has no assets or property other than personal items, such as clothing or jewelry, and necessary household furniture, all with an approximate value of $100.00.

6. Her welfare benefits from the State of Connecticut do not include an allotment for legal and court fees.

7. She has no income, property or assets from which she can afford to pay the fees, costs, expenses and security in the proceeding.

8. Her attorney is serving without fee in this case.

/s/ Mary Wierzbicki [SEAL]

Sworn to and subscribed before me this 6th day of March, 1968.

/s/ Ann J. Oppel
Commissioner of the
Superior Court

My Commission Expires: April 1, 1973

EXHIBIT "A" TO COMPLAINT

SUPERIOR COURT, NEW HAVEN COUNTY

March 11, 1968

No.

MAMIE WILLIAMS

vs.

OCTAVIOUS WILLIAMS

FINANCIAL AFFIDAVIT

Affiant hereby respectfully represents that:

1. She is the plaintiff in the above-captioned proceeding.
2. Her income consists solely of an allotment received from the Department of Welfare, State of Connecticut, totalling $362.20 per month.
3. On the above income she supports herself and six (6) children.
4. The normal monthly expenses incurred for herself and her children are as follows:

Food	$	
Rent		
Utilities		
Clothing		$360.20
Laundry		
Household		
Transportation		
Entertainment	5.40	
Education	3.00	
Miscellaneous	2.26	
Total	$370.86	

5. She has no assets or property other than personal items, such as clothing or jewelry, and necessary household furniture, all with an approximate value of $.

6. Her welfare benefits from the State of Connecticut do not include an allotment for legal and court fees.

7. She has no income, property or assets from which she can afford to pay the fees, costs, expenses and security in the proceeding.

8. Her attorney is serving without fee in this case.

/s/ Mamie Williams [SEAL]

Sworn to and subscribed before me this 8 day of March, 1968.

/s/ Ann J. Oppel
Commissioner of the
Superior Court

My Commission Expires: April 1, 1973

EXHIBIT "A" TO COMPLAINT

SUPERIOR COURT, NEW HAVEN COUNTY

March 11, 1968

No.

CATHERINE STRAIN

vs.

WALTER STRAIN

FINANCIAL AFFIDAVIT

Affiant hereby respectfully represents that:

1. She is the plaintiff in the above-captioned proceeding.
2. Her income consists solely of an allotment received from the Department of Welfare, State of Connecticut, totalling $204.00 per month.
3. On the above income she supports herself and Five children.
4. The normal monthly expenses incurred for herself and her children are as follows:

Food	$ 79.00		
Rent	120.00	welfare pays	
Utilities	—		
Clothing			
Laundry			
Household		$118.95	
Transportation			
Entertainment			
Education			
Miscellaneous	6.05		
Total	$204.00		

5. She has no assets or property other than personal items, such as clothing or jewelry, and necessary household furniture, all with an approximate value of $150.00.

6. Her welfare benefits from the State of Connecticut do not include an allotment for legal and court fees.

7. She has no income, property or assets from which she can afford to pay the fees, costs, expenses and security in the proceeding.

8. Her attorney is serving without fee in this case.

/s/ Catherine Strain [SEAL]

Sworn to and subscribed before me this 4 day of March, 1968.

/s/ Ann J. Oppel
Notary Public

My Commission Expires: April 1, 1974

EXHIBIT "A" TO COMPLAINT

SUPERIOR COURT, NEW HAVEN COUNTY

March 11, 1968

No.

BERTHA BARKER

vs.

DONALD BARKER

FINANCIAL AFFIDAVIT

Affiant hereby respectfully represents that:

1. She is the plaintiff in the above-captioned proceeding.
2. Her income consists solely of an allotment received from the Department of Welfare, State of Connecticut, totalling $282.00 per month.
3. On the above income she supports herself and 3 (three) children.
4. The normal monthly expenses incurred for herself and her children are as follows:

Food	$120.00	
Rent	80.00	welfare pays
Utilities	30.00	
Clothing	15.00	
Laundry	6.00	
Household	2.00	
Transportation	3.00	
Entertainment	3.00	
Education	2.06	
Miscellaneous	21.00	
Total	$282.06	

5. She has no assets or property other than personal items, such as clothing or jewelry, and necessary household furniture, all with an approximate value of $200.00.

6. Her welfare benefits from the State of Connecticut do not include an allotment for legal and court fees.

7. She has no income, property or assets from which she can afford to pay the fees, costs, expenses and security in the proceeding.

8. Her attorney is serving without fee in this case.

/s/ Bertha Barker [SEAL]

Sworn to and subscribed before me this 5th day of March, 1968.

/s/ Arthur B. LaFrance
Commissioner of the
Superior Court

EXHIBIT "A" TO COMPLAINT

SUPERIOR COURT, NEW HAVEN COUNTY

March 11, 1968

No.

MARY YEATON

vs.

CLYDE YEATON

FINANCIAL AFFIDAVIT

Affiant hereby respectfully represents that:

1. She is the plaintiff in the above-captioned proceeding.
2. Her income consists solely of an allotment received from the Department of Welfare, State of Connecticut, totalling $209.40 per month.
3. On the above income she supports herself and two children.
4. The normal monthly expenses incurred for herself and her children are as follows:

Food	$ 80.00
Rent	30.00
Utilities	—
Clothing	25.00
Laundry	2.00
Household	5.00
Transportation	5.00
Entertainment	3.00
Education	42.50
Miscellaneous	17.00
Total	$209.50

5. She has no assets or property other than personal items, such as clothing or jewelry, and necessary household furniture, all with an approximate value of $150.00.

6. Her welfare benefits from the State of Connecticut do not include an allotment for legal and court fees.

7. She has no income, property or assets from which she can afford to pay the fees, costs, expenses and security in the proceeding.

8. Her attorney is serving without fee in this case.

/s/ Mary Yeaton [SEAL]

Sworn to and subscribed before me this 5th day of March, 1968.

/s/ Arthur B. LaFrance
Commissioner of the
Superior Court

EXHIBIT "A" TO COMPLAINT

SUPERIOR COURT, NEW HAVEN COUNTY

March 11, 1968

No.

BETTY ANN PEREZ

vs.

LOUIS PEREZ

FINANCIAL AFFIDAVIT

Affiant hereby respectfully represents that:

1. She is the plaintiff in the above-captioned proceeding.
2. Her income consists solely of an allotment received from the Department of Welfare, State of Connecticut, totalling $166.00 per month.
3. On the above income she supports herself and (3) three children.
4. The normal monthly expenses incurred for herself and her children are as follows:

Food	$103.00	
Rent	88.00	welfare pays
Utilities	—	
Clothing	15.00	
Laundry	2.00	
Household	14.00	
Transportation	—	
Entertainment	—	
Education	9.00	
Miscellaneous	22.50	
Total	$165.50	excluding rent

5. She has no assets or property other than personal items, such as clothing or jewelry, and necessary household furniture, all with an approximate value of $200.00.

6. Her welfare benefits from the State of Connecticut do not include an allotment for legal and court fees.

7. She has no income, property or assets from which she can afford to pay the fees, costs, expenses and security in the proceeding.

8. Her attorney is serving without fee in this case.

/s/ Mrs. Betty Perez [SEAL]

Sworn to and subscribed before me this 26 day of February, 1968.

/s/ Ann J. Oppel
Notary Public

My Commission Expires:
April 1, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Docket No. Civil 12,513

April 15, 1968

[File Endorsement Omitted in Printing]

GLADYS BODDIE, ET ALS.

vs.

THE STATE OF CONNECTICUT, ET ALS.

MOTION FOR ORDER THAT THIS ACTION IS MAINTAINABLE AS A CLASS ACTION—Filed April 20, 1968

The plaintiffs hereby move for an order that this action should be maintained as a class action and represent that:

1. The class to be represented is composed of women residing in Connecticut, receiving welfare assistance from the State, who wish to obtain a divorce, but are barred from the courts because of inability to pay the court fees and costs incident to a divorce proceeding.
2. This class is so numerous that joinder of all members would be impracticable.
3. There are questions of law or fact common to the class.
4. The claims of the representative parties are typical of the claims of the class.
5. The representative parties will fairly and adequately protect the interests of the class.
6. The question of law which is common to the members of the class predominates over questions which might affect individual members and thus a class action is superior to individual litigation for the fair and efficient adjudication of the controversy.

THE PLAINTIFFS

By /s/ Arthur B. LaFrance
Their Attorney

ORDER

The foregoing motion having been submitted to the Court, and good cause appearing therefor, it is hereby

ORDERED, that the action is hereby declared to be a class action and the named plaintiffs have the status of representatives of the class.

DATED this ..... day of April, 1968.

BY THE COURT

.....

Judge

[Summons With Marshal's Return Thereon (Omitted in Printing)]

[Appearance of Arthur B. LaFrance Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 12,513

[File Endorsement Omitted in Printing]

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, CATHERINE STRAIN, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated, PLAINTIFFS

v.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut, DEFENDANTS

DESIGNATION OF JUDGES—Filed April 30, 1968

Having been notified by the Honorable M. Joseph Blumenfeld, United States District Judge for the District of Connecticut, that an application has been filed in the above matter for relief pursuant to Title 28 United States Code Section 2281, pursuant to Title 28 United States Code Section 2284 I hereby designate the following judges, in addition to the Honorable M. Joseph Blumenfeld, to hear and determine said cause as provided by law: Honorable J. Joseph Smith, United States Circuit Judge, and Honorable T. Emmet Clarie, United States District Judge for the District of Connecticut.

IT IS HEREBY ORDERED that this order be filed in the above entitled cause in the said District Court.

/s/ J. Edward Lumbard
Chief Judge,
United States Court of Appeals
for the Second Circuit

Dated: New York, N. Y.
April 25, 1968

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 12,513

[File Endorsement Omitted in Printing]

GLADYS BODDIE, ET ALS., PLAINTIFF

vs.

STATE OF CONNECTICUT, ET ALS., DEFENDANT

NOTICE OF MOTION—Filed May 2, 1968

[Permission to file a brief as amicus curiae granted. Permission to make oral argument denied. M.J.B. 5-13-68]

TO: United States Attorney
United States Courthouse
New Haven, Connecticut

Arthur B. LaFrance, Esquire
768 Grand Avenue
New Haven, Connecticut

Dear Sirs:

PLEASE TAKE NOTICE that the New Haven Civil Liberties Council will bring its motion to obtain permission to file a brief and make oral argument as *amicus curiae* before the United States District Court for the District of Connecticut for a hearing on Monday, May 13, 1968, at 10:09 A.M., at Hartford, Connecticut or as soon thereafter as counsel may be heard.

Dated at New Haven, Connecticut this 2nd day of May, 1968.

NEW HAVEN CIVIL
LIBERTIES COUNCIL

By: /s/ Samuel W. Bowlby
205 Church Street
P.O. Box 1936
New Haven, Connecticut 06509
—Attorney for New Haven
Civil Liberties Council—

* * * *

Civil Action No. 12,513

MOTION TO FILE BRIEF AND MAKE ORAL ARGUMENT AS AMICUS CURIAE—Filed May 2, 1968

Comes now The New Haven Civil Liberties Council and moves the Court for permission to file a brief and make oral argument as *amicus curiae* on the issues of the violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution as raised in the Plaintiff's Complaint.

Dated at New Haven, Connecticut this 2nd day of May, 1968.

NEW HAVEN CIVIL LIBERTIES COUNCIL

By: /s/ Samuel W. Bowlby

[Certificates of Service (Omitted in Printing)]

[Appearance of Raymond J. Cannon (Omitted in Printing)]

[Appearance of Edward J. Peters, Jr. (Omitted in Printing)]

[Motion to extend the time to file a pleading with endorsement thereon (Omitted in Printing)]

[Appearance of Jack Greenberg, Leroy D. Clark and Philip G. Schrag (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 12513

[File Endorsement Omitted in Printing]

GLADYS BODDIE, ET ALS., PLAINTIFFS

vs.

STATE OF CONNECTICUT, ET ALS., DEFENDANTS

AMENDMENT TO COMPLAINT—Filed June 7, 1968

The plaintiffs hereby amend their complaint in the following particulars:

1. by adding the following paragraph:

"9. Four of the named plaintiffs are of the Negro race."

2. by amending the prayer for relief, substituting the following for the second clause:

"(2). Declare the practice and the statute, 52 C.G.S.A., section 259 (as modified by P.A. 628 of the 1967 Legislature), requiring payment of court fees and expenses as a condition precedent to obtaining court relief as unconstitutional when applied to these indigent plaintiffs and all other members of the class which they represent;"

THE PLAINTIFFS

By /s/ Arthur B. LaFrance
Their Attorney
768 Grand Avenue
New Haven, Connecticut

[Certificate of Service (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 12513

[File Endorsement Omitted in Printing]

GLADYS BODDIE ET AL, PLAINTIFFS

vs.

STATE OF CONNECTICUT ET AL, DEFENDANTS

MOTION TO DISMISS—Filed June 10, 1968

The defendants, State of Connecticut, Edward Horwitz, Clerk of the Superior Court of Connecticut for New Haven County, Judge Joseph S. Long, Superior Court Judge of the State of Connecticut, and Justice John P. Cotter, Supreme Court Justice and Chief Court Administrator for the State of Connecticut, pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, hereby move the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against the defendants upon which relief can be granted.
2. To dismiss the action or in lieu thereof to quash the return of service of summons on the ground that the defendant, State of Connecticut, has not been properly served with process in this action.
3. To dismiss the action because the named defendants are immune from suit under the named Civil Rights Acts.
4. To dismiss the action because the Complaint fails to state a cause of action showing the deprivation of

any rights, privileges or immunities secured by the Constitution and Laws of the United States.

DEFENDANTS:

STATE OF CONNECTICUT,
EDWARD HORWITZ,
JUDGE JOSEPH S. LONGO,
JUSTICE JOHN P. COTTER

By: ROBERT K. KILLIAN
Attorney General

/s/ Raymond J. Cannon
Assistant Attorney General

/s/ Edward J. Peters, Jr.
Assistant Attorney General

NOTICE OF MOTION

TO: GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, CATHERINE STRAIN, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated, *Plaintiffs*

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the Federal Office Building, 450 Main Street, Hartford, Connecticut, on the 24th day of June, 1968, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

(Signed) Edward J. Peters, Jr.
Attorney for the Defendants
30 Trinity Street
Hartford, Connecticut 06115

[Certificate of Service (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 12513

[File Endorsement Omitted in Printing]

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, CATHERINE STRAIN, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated, PLAINTIFFS

v.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut, DEFENDANTS

Before: SMITH, Circuit Judge, BLUMENFELD and CLARIE, District Judges.

ARTHUR B. LAFRANCE and JOSEPH M. SHORTALL, New Haven Assistance Association, Inc., New Haven, Connecticut, for Plaintiffs.

JACK GREENBERG, LEROY D. CLARK, and PHILIP G. SCHRAG, New York, N.Y., for Plaintiffs.

SAMUEL W. BOWLBY, New Haven, Conn., for New Haven Civil Liberties Council, *amicus curiae*.

ROBERT K. KILLIAN, Attorney General, State of Connecticut, RAYMOND J. CANNON, Asst. Attorney General, and EDWARD J. PETERS, JR., Asst. Attorney General, Hartford, Connecticut, for Defendants.

MEMORANDUM OF DECISION ON MOTION TO DISMISS—
July 16, 1968

SMITH, Circuit Judge.

This case presents the question whether a state denies the equal protection of the laws guaranteed by the Four-

teenth Amendment when it requires indigent persons seeking divorce to pay filing fees and costs which they are unable to pay before allowing them the access to the state courts which is necessary to obtaining a divorce.

The plaintiffs have brought this class action on behalf of those women in the State of Connecticut receiving welfare assistance from the State who wish to obtain divorce, but are allegedly barred from doing so by reason of their inability to pay the court fees and costs incident to a divorce proceeding. They seek a declaratory judgment that C.G.S.A. § 52-259 (as amended by Sec. 3, Public Act #628, 1967 Legislature), requiring payment of court fees, is unconstitutional as applied to the class they represent, and an injunction requiring the defendants to permit these plaintiffs (and other members of the class in future proceedings) to proceed with their divorce actions without payment of any fees and costs, and requiring the defendants to effect all necessary service and notice incident to the divorce actions without cost to the plaintiffs.

Plaintiffs rely upon 42 U.S.C. §§ 1981, 1983, and 1988 for a cause of action, upon 28 U.S.C. § 1343(3) for this court's jurisdiction, and upon 28 U.S.C. §§ 2201 and 2202 for the remedy of declaratory judgment and further relief based upon any declaratory judgment which might issue. Since plaintiffs seek an injunction restraining the enforcement of a State statute, a three-judge District Court has been convened. 28 U.S.C. §§ 2281, 2284.

The named defendants are the State of Connecticut; Edward Horwitz, Clerk of the Superior Court for New Haven County; Hon. Joseph S. Longo, a Judge of the Superior Court; and Hon. John P. Cotter, a Justice of the Connecticut Supreme Court and the Chief Court Administrator of Connecticut's judicial system. The plaintiffs allege in their complaint that on March 13, 1968 they applied to the Superior Court for New Haven County, asking that they be permitted to prosecute divorce proceedings without payment of filing or service fees, and submitting financial affidavits; that on March 14 the defendant Horwitz rejected the applications and accompanying papers on the ground that he could not accept them until an entry fee had been paid; and on April 2 the defendants

Longo and Cotter declined to grant the applications or allow the papers to be filed. It is further alleged that court costs and expenses incident to a divorce proceeding are normally in excess of sixty dollars, the entry fee being forty-five dollars and the cost of service being ten to fifteen dollars by sheriff and one hundred dollars or more by publication, and that the plaintiffs are unable to pay the fees and costs. It is claimed that the State of Connecticut is denying the plaintiffs the equal protection of the laws by barring them from seeking a divorce because of their indigency, and is denying them due process of law by infringing their right to "petition the Government for a redress of grievances", U.S. CONST. Am. I.

The defendants have moved to dismiss the complaint upon the following grounds: (1) the complaint does not draw into question the constitutionality of any state statute, and therefore it was improper to convene a three-judge court (although the motion papers do not request that the three-judge court be dismissed, we assume that it is that, and not dismissal of the complaint, which defendants request on the basis of this argument); (2) the notice provisions of 28 U.S.C. § 2284(2) have not been complied with; (3) the State of Connecticut may not be sued, and the individual defendants are immune from suit as judicial officers acting in a judicial capacity; and (4) failure to state a cause of action.

The first three issues raised by the defendants can be disposed of briefly.

(1) Defendants argue that since the general constitutionality of the Connecticut statute (C.G.S.A. § 52-259, as amended) is not questioned, plaintiffs only attacking the statute as it applies to indigents, there should be no three-judge panel in this case. They rely upon the language in *Benoit* v. *Gardner*, 351 F.2d 846, 848 (1 Cir. 1965), stating that no three-judge court is required where an injunction is sought on the ground that a valid statute is being executed in an unconstitutional manner. The argument misconceives the issue. Where an injunction is sought against enforcement of a state statute in a manner unquestionably expressive of the legislative intent,

a three-judge court is required, even if the statute might be perfectly constitutional in some of its intended application. As the Supreme Court succinctly put it in *Phillips* v. *United States*, 312 U.S. 246, 251 (1941), "The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy." See also *Evergreen Review, Inc.* v. *Cahn*, 230 F.Supp. 498, 502 (E.D.N.Y. 1964); and *Poindexter* v. *Louisiana Financial Assistance Commission*, 258 F.Supp. 158, 165 (E.D. La. 1966). There is no question but that the Connecticut legislature intends the statute to apply to indigents as well as non-indigents; indeed, that is the thrust of the defendants' argument on the mertis. The defendants have no discretion in the enforcement of the statute—as they point out, there is no statutory provision for the waiver of entry fees in a divorce action.

(2) 28 U.S.C. § 2284(2) provides, in relevant part: "If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State." We find no merit in the argument in defendants' brief that this requirement has not been complied with, since the defendants were served, the attorney general entered an appearance, defendants' brief was filed *fourteen* days in advance of the hearing on the motion to dismiss, and no hearing has yet been set on the application for injunction.

(3) Plaintiffs concede that the State of Connecticut is not a proper party to this action. At the hearing on the motion the complaint was therefore dismissed as to the State. See, e.g., *Serrano* v. *State of California*, 361 F.2d 474 (9 Cir. 1966).

The argument that the individual defendants are immune from suit as judicial officers of the State of Connecticut acting in their judicial capacities is not sound. The defendant Horwitz is not a judicial officer. As to defendants Longo and Cotter, it is clear, of course, that judges are immune from liability for damages for actions taken in the exercise of the judicial function. *Pierson* v. *Ray*, 386 U.S. 547, 553-54 (1967). The rationale of

the rule is that a judge should not have to fear litigation by those unsatisfied with his treatment of their cases. Although there is language in some of the cases stating the rule as one of absolute immunity from suit, we have found no cases applying the rule where it would absolutely bar an action for an injunction or mandamus against proposed actions beyond the powers of a judge.

Moreover, these defendants are acting in an administrative capacity in barring the plaintiffs from bringing their divorce actions without the payment of fees and costs. In short, they are entrusted with administration of the statute, a function quite different from the judicial function, exercised for example by Judge Healey of the Connecticut Superior Court in *Davis* v. *Davis* (unpublished opinion, in the file in this case), denying an application to proceed in forma pauperis in a divorce action upon a full consideration of the merits of the applicants' arguments.

If the defendants' argument were correct, a state could immunize any unconstitutional policy against the injunctive power of the federal courts by entrusting its administration to an officer of its judicial branch. The proper defendant in a case such as this one is the state's agent in the implementation of the allegedly unconstitutional policy; and the defendants do not allege that any officer of the State of Connecticut other than themselves is entrusted with administration of the statute. Cf. *Dorsey* v. *State Athletic Commission*, 168 F.Supp. 149, 151 (E.D. La. 1958), aff'd per curiam, 359 U.S. 533. See also *Robichaud* v. *Ronan*, 351 F.2d 533, 536-37 (9 Cir. 1965). The individual defendants are not immune from this suit.

(4) This brings us to the heart of the matter. May a state limit access to its civil courts and particularly in this instance, to its divorce courts, by the requirement of a filing fee or other fees which effectively bar persons on relief from commencing actions therein?[1]

---

[1] While the complaint herein may be defective in failing to show that any of the plaintiffs are eligible for divorce by residence and possession of non-frivolous grounds under Connecticut law, such deficiencies could be cured by amendment. In any case, the defendants' attack is directed primarily to the fundamental basis of the complaint, and we see no reason not to reach it here.

Taking the factual allegations of the complaint as true, as we must on a motion to dismiss, 2A Moore's Fed. Prac. 2d ed. 1968, ¶ 12.08 n.3, *Clark* v. *Uebersee Finanz Korp.*, 332 U.S. 480 (1947), we must assume that these plaintiffs are effectively barred from bringing suit by the filing fee and other costs. We will assume further that the $45 filing fee alone is a sufficient bar in the case of some at least of the plaintiffs. Since anyone who pays the fees may at least file his complaint, it is plain that there is in effect a classification of prospective civil suitors between those able to afford the court costs and those unable to afford them.

Plaintiffs insist that such a classification, based solely on affluence (or poverty) is inadmissible as in violation of equal protection of the laws and due process. Plaintiffs argue with considerable force that access to the civil courts and particularly in domestic relations cases is a right of great importance, comparable to the right of freedom from imprisonment on unjust conviction of crime enforced in criminal and habeas corpus cases, so that its exercise may not be unequally restricted, under the teaching of, e.g., *Griffin* v. *Illinois*, 351 U.S. 12 (1956), *Smith* v. *Bennett*, 365 U.S. 708 (1961), *Lane* v. *Brown*, 372 U.S. 477 (1962).

But there are, of course, differences between the right to freedom from capital punishment or imprisonment and the right of access to civil courts to adjudicate claims to money or property or adjust marital status.

We have not yet gone so far as to hold that no state services may be conditioned on payment of fees, cf. *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966), so long as the fees are reasonably considered by the legislature to be required for legitimate state purposes. However, it may be noted that the dissent from the denial of certiorari in *Williams* v. *Shaffer*, 385 U.S. 1037 (1967) demonstrates that at least three members of the Supreme Court would bar requirements of such fees from the indigent, at least in eviction cases. As Mr. Justice Douglas has reminded us, speaking for the Court in *Harper* v. *Virginia Bd. of Elections*, supra at 669:

> We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics" (*Lochner* v. *New York*, 198 U.S. 45, 75). Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See *Malloy* v. *Hogan*, 378 U.S. 1, 5-6. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.

Our problem is whether and to what extent the political theories of the role of the state toward the indigent have changed as reflected in present "notions of what constitutes equal treatment for purposes of the Equal Protection Clause . . ." Political theories of this role are changing in the particular field brought before us in this action, as witnessed by the provision for in forma pauperis civil actions by the Congress and many, perhaps most, of the states.[2] But failure of the other states, including Connecticut, to keep up with this developing trend has not yet been considered by any court to constitute a lack of equal treatment under the Equal Protection Clause.

There are distinctions between the cases involving imprisonment, denial of voting rights and the ordinary civil actions. The relative importance of the subject with respect to which equality is sought must also be taken into account.[3] The right to freedom from unjust imprisonment and the right of franchise were of particular concern to the framers of the Constitution and Bill of Rights and the post-Civil War amendments. Moreover, in the criminal, habeas corpus and eviction cases there is some direct state action involved, not present in most private

---

[2] See the Indigent's Right to Counsel in Civil Cases, 76 Y.L.J. 545, 559 n.68 (1967).

[3] In *Harper* the court said at p. 670, "the right to vote is too precious, too fundamental to be so burdened or conditioned".

civil actions, a factor which may have some weight in denying the state a right to discriminate in the first mentioned type of action by fee requirements. In the ordinary civil (including divorce) case the state has no such direct participation, merely providing the judicial machinery for determination of the disputes. And the state does have at least two legitimate purposes in court fees, first, providing financial support for the court establishment (perhaps one-fifth of its cost in Connecticut, we are told), and second, discouraging resort to litigation in purely frivolous matters, which might much more often be filed by indigent and affluent alike if the service were entirely free from cost.

It is, however, entirely possible that the failure of the state to provide in forma pauperis relief in the civil courts is the product, not of considered choice or deliberate classification, but rather of inertia born of lack of existence of the problems of the indigent in present proportions, or at least lack of recognition of their present extent as it affects availability to the indigent of the processes of the civil courts open to others. In these circumstances we should hesitate to act in any case until the ordinary political processes have an opportunity to function in normal course.

Many states—at least 23, we are told, as well as the United States, provide that indigents may proceed in the civil courts in forma pauperis, without payment of fees. We agree that this is desirable, and that Connecticut might well follow the example and remove the discrimination now suffered by the indigent in access to the civil courts. But we do not feel that the present system, undesirable as it is, is a denial of a right so fundamental that the Constitution, by the equal protection or due process clause, forbids the state from its continuance.

Militating against striking down the present fee legislation by judicial fiat is the extreme difficulty of judicial determination of the course the state should be required to follow. Should the relief agencies provide the fees as part of support to the indigent? From what source should such funds be obtained, and how should they be administered? Should the state courts be required to waive

court fees for the indigent? The choice of which method is more fitted to the needs and policy of the state is a legislative choice the courts should take on only if necessary. Likewise with related matters. Should the state pay for the indigent other quite essential costs, which are not now provided or paid for by the state for any private litigants, such as process service fees, or service by publication, investigative and legal services?

The duties to its disadvantaged people of an affluent society, as represented by its public institutions, are being recognized more fully daily. Where the handicaps of poverty have resulted in unequal justice in criminal matters the courts have found in the equal protection clause a source of authority to correct the inequalities and to strike down criminal sanctions imposed on those denied equal protection.

Although with some hesitation, we conclude that the court should not, by resort to the Constitutional guarantees which for 100 years have been considered not to demand such state action, attempt to speed up the amelioration of the lot of the indigent by forcing the state to provide free access to the civil courts without payment of a relatively modest fee.[4] We should rather leave this to correction by the political process through legislative action, which may reach a more satisfactory result more speedily than the presently available machinery of the courts can effectively accomplish.[5]

---

[4] We are informed that in the case of *Davis* v. *Davis*, supra p. 6, the plaintiff has abandoned plans to appeal from the denial of her application to proceed in forma pauperis and intends to pursue her divorce immediately in the Superior Court at Bridgeport.

[5] See Note "Discriminations Against the Poor and the Fourteenth Amendment", 81 H.L.R. 435, 452 (1967).

Motion granted. Complaint dismissed.[6] Judgment may enter dismissing the action. No further order is necessary.

/s/ J. Joseph Smith
U.S.C.J.

/s/ M. Joseph Blumenfeld

/s/ T. Emmet Clarie
U.S.D.JJ.

July 16, 1968

[6] In view of the disposition of the motion to dismiss, we do not situted class. Nor do we find it necessary to discuss defendants' stituted class. Nor do we find it necessary to discuses defendants' contention that the state's particular interest in the preservation of the family entitles it to discourage divorce, except to point out that the legislation under attack reveals no such intention, since the fee is the same in divorce actions as in other civil actions.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 12,513

[File Endorsement Omitted in Printing]

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, CATHERINE STRAIN, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated

v.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut

JUDGMENT—July 17, 1968

This cause came on to be heard before a three-judge court (Honorable J. Joseph Smith, United States Circuit Judge for the Second Circuit; Honorable M. Joseph Blumenfeld and Honorable T. Emmet Clarie, United States District Judges for the District of Connecticut) on defendants' Motion to Dismiss, and the Court having granted the said motion in its opinion filed July 17, 1968,

It is ORDERED, ADJUDGED and DECREED that the plaintiffs take nothing and that the action be and it is hereby dismissed.

Dated at New Haven, Connecticut, this 17th day of July, 1968.

/s/ Gilbert C. Earl
Clerk, United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Docket No. 12513

September 11, 1968

[File Endorsement Omitted in Printing]

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, CATHERINE STRAIN, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated, PLAINTIFFS

vs.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed September 12, 1968

I. Notice is hereby given that the abovenamed plaintiffs (except for Catharine Strain), hereby appeal to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on July 17, 1968.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all affidavits, pleadings and motions of the parties;

III. The following questions are presented by this appeal:

Did the State of Connecticut, by requiring these indigent plaintiffs to pay court fees and costs as a condition precedent to initiating divorce suits deny these indigent plaintiffs access to Connecticut courts, in violation of their

rights to petition for redress of grievances, to due process and to equal protection of the laws?

If so, may the State of Connecticut, as well as the individual defendants, be enjoined from continuing to interfere with plaintiffs' rights?

[Certificate of Service Omitted in Printing]

[Clerk's Certificate to Foregoing Transcript Omitted in Printing]

SUPREME COURT OF THE UNITED STATES

No. 1131 Misc., October Term, 1968

GLADYS BODDIE, ET AL., APPELLANTS

v.

CONNECTICUT, ET AL.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 23, 1969

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

SUPREME COURT OF THE UNITED STATES

No. 1131 Misc., October Term, 1968

GLADYS BODDIE, ET AL., APPELLANTS

v.

CONNECTICUT, ET AL.

APPEAL from the United States District Court for the District of Connecticut.

ORDER NOTING PROBABLE JURISDICTION—June 23, 1969

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the appellate docket as No. 1553, and placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 357100 30

FILE COPY

Supreme Court, U.S.
FILED
AUG 6 1969
JOHN F. DAVIS, CLERK

Statement not Printed
case not printed
not printed

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~265~~ 27

GLADYS BODDIE, et al.,

Appellants,

vs.

THE STATE OF CONNECTICUT, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Connecticut

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

ALLAN ASHMAN,
BETTIE MCJUNKIN,
1155 E. 60th Street,
Chicago, Illinois 60637,

Attorneys for Amicus Curiae
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION.

Hughes
E. 60th St.
Ill.
60637

MIDWEST LAW PRINTING CO., CHICAGO (312), FINANCIAL 6-2626

INDEX

	PAGE
Interest of Amicus Curiae	1
Opinion Below	3
Jurisdiction	3
Statutory Provision Involved	3
Question Presented	4
Statement of the Case	5
Summary of Argument	5
Argument:	
I. The State of Connecticut's Refusal to Waive Court Fees and Costs for Indigent Persons Who Wish to Initiate an Action for Divorce Effectively Denies These Persons Access to Connecticut's Courts in Violation of the Fourteenth Amendment to the United States Constitution	6
A. The Equal Protection Clause Requires that Persons Should Not Be Denied Access to State Courts Because of Their Poverty	6
B. Due Process Requires that Poor Persons Be Guaranteed Access to a State's Divorce Courts	18
II. The Equal Protection Clause Is Not Limited in Its Application to Criminal Cases	24
III. Fee Requirements in Divorce Actions that Effectively Bar the Poor from Gaining Access to a State's Divorce Courts Serve No Good Public Purpose	30

A. Denying Divorce to Poor Persons Contributes to Social Disorganization 30

B. Sound Public Policy Supports the Right of the Poor to Access to a State's Divorce Courts 35

Conclusion 36

Appendices:

A. Provision For In Forma Pauperis Proceedings 1a

B. Caseload Statistics 12a

C. The Interest Of Selected States In Divorce Proceedings 17a

TABLE OF AUTHORITIES

Cases:

Allen v. Allen, 46 A. 242, 73 Conn. 54 (1900) 12

Barber v. Gladden, 210 Ore. 46, 298 P. 2d 986 (1956) 27

Barbier v. Connolly, 113 U.S. 27 (1885) 7, 27

Boddie, et al. v. Conn., et al., 286 F. Supp. 968 (D. Conn. 1968) 6, 13, 14

Burns v. Ohio, 360 U.S. 252 (1959) 10

Campbell v. Chicago & Northwestern Ry., 23 Wis. 490 (1868) 25

Casale v. Casale, 86 A. 2d 568, 138 Conn. 490 (1952) 23

Civil Rights Cases, 109 U.S. 3 (1883) 22

Douglas v. California, 372 U.S. 353 (1963) 8

Eskridge v. Washington, 357 U.S. 214 (1958) 10

Griffin v. Illinois, 351 U.S. 12 (1956) 8, 11, 13, 26

Griswold v. Connecticut, 381 U.S. 479 (1965) 21

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) 13, 27

Hickey v. Rhine, 16 Tex. 576 (1856) 26

Hurtado v. California, 110 U.S. 516 (1883) 19

In re Gault, 387 U.S. 1 (1967) 19

In re Karen (Munkelwitz) v. Hennepin County Welfare District, 276 Minn. 554, 150 N.W. 2d 24 (1967) 25
Jeffreys v. Jeffreys, 57 Misc. 2d 416, 296 N.Y.S. 2d 74 (1968) 9, 12, 13, 24, 27, 28
Long v. District Court of Iowa, 385 U.S. 192 (1966) 26
Loving v. Virginia, 388 U.S. 1 (1967) 22, 23
Martin v. Superior Court of California, 176 Cal. 289, 168 Pac. 135 (1917) 25
Meyer v. Nebraska, 262 U.S. 390 (1923) 21
M'Clenahan v. Thomas, 6 N.C. (Murph.) 198 (1813) 26
McKane v. Durston, 153 U.S. 684 (1894) 19
NAACP v. Button, 371 U.S. 415 (1963) 35
Ohio v. Akron Park District, 281 U.S. 74 (1929) .. 19, 20
Osborn v. Zoning Board of Appeals of City of Stanford, 11 Conn. Sup. 489 (1943) 20, 21
Palko v. Connecticut, 302 U.S. 319 (1937) 19
Rapid Transit Corp. v. City of New York, 303 U.S. 573 (1938) 14
Republic Pictures Corp. v. Kappler, 151 F. 2d 543 (8th Cir. 1945), affirmed 327 U.S. 757 (1945) 8
Reynolds v. Smith, ... U.S. ....., 89 S. Ct. 1322 (1969) 14
Schroeder v. New York, 371 U.S. 208 (1962) 20
Shapiro v. Thompson, ... U.S. ....., 89 S. Ct. 1322 (1969) 14
Shearman v. Pope, 106 N.Y. 664, 12 N.E. 713 (1887) 26
Smith v. Bennett, 365 U.S. 708 (1961) 10, 26, 27
Spalding v. Bainbridge, 12 R.I. 244 (1879) 26
Washington v. Legrant, ... U.S. ....., 89 S. Ct. 1322 (1969) 14
Williams v. Oklahoma City, ... U.S. ....., 89 S. Ct. 1818 (1969) 17
Williams v. Shaffer, 385 U.S. 1037 (1967) 17, 29, 30
Willis v. Willis, 20 Pa. Dist. 720 (1911) 26
Wolf v. Colorado, 338 U.S. 25 (1949) 18

Statutory Provisions:

Conn. Gen. Stat. Ann. Sec. 46-13 12
Conn. Gen. Stat. Ann. Sec. 52-259 as amended by Pub. Act. 628, Sec. 3 (1967) 3, 4, 6, 12, 17, 23, 35
Conn. Gen. Stat. Ann. Tit. 46 12
Elizabeth I, Instructions to Lord President and Council of the North (1603) 24
II Henry VII, c. 12 (1495) 24
23 Henry VIII, c. 15 (1531) 24
42 U.S.C., Sec. 1981 27
28 U.S.C., Sec. 1915 (1964) 7

Constitutional Provisions:

Connecticut Constitution, Art. 1, Sec. 8 21
Connecticut Constitution, Art. 1, Sec. 10 ..... 20, 21, 24
U. S. Constitution, XIV Amendment 18

Other Authorities:

"Alcohol Project of the Emory University Department of Psychiatry," *The President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness,* Appendix G, 82 (1967) 33
Barron, *The Juvenile Delinquent in Society* .. (1960) 35
Cahn & Cahn, "The War on Poverty: A Civilian Perspective," 73 *Yale L. J.* 1317 (1964) 10
Comment, "Procedure: Suits In Forma Pauperis," 6 *Calif. L. Rev.* 226 (1918) 24
Craig and Glick, "Ten Years Experience With the Glueck Social Prediction Table," 9 *Crime and Delinquency* 249 (1963) 34
Foster, "Common Law Divorce," 46 *Minn. L. Rev.* 43 (1961) 31, 32
Hammer, "Divorce Reform in California: The Governor's Commission on the Family and Beyond," 9 *Santa Clara Lawyer* 32 (1968) 31

Maguire, "Poverty and Civil Litigation," 36 *Harv. L. Rev.* 361 (1936) 24
The Negro Family: A Study Prepared by the Office of Policy Planning and Research, United States Department of Labor (1965) 33, 34
Note, "Discriminations Against the Poor and The Fourteenth Amendment," 81 *Harv. L. Rev.* 435 (1967) 15, 24
Note, "Indigent's Right to Counsel in Civil Cases," 76 *Yale L. J.* 545 (1967) 10, 11
Recent Developments, "Poverty and Equal Access to the Courts: The Constitutionality of Summary Dispossess in Georgia," 20 *Stan. L. Rev.* 766 (1966) 20
Report Of The National Advisory Commission On Civil Disorders (paperback ed. 1968) 33, 35
Rheinstein, "The Law of Divorce and the Problem of Marriage Stability," 9 *Vand. L. Rev.* 633 (1956) 31, 32
Scarpitti, Murray, Dinitz, and Reckless, "The Good Boy in a High Delinquency Area: Four Years Later," 25 *American Sociological Rev.* 555 (1960) 34
Silverstein, *Defense of the Poor in American State Courts* (1965) 10, 11
Silverstein, *Public Provisions For Costs and Expenses of Civil Litigation* (1966) 14
tenBroek, "California's Dual System of Family Law: Its Origin, Development and Present Status," 17 *Stan. L. Rev.* 614 (1965) 30, 34
Tussman and tenBroek, "The Equal Protection of the Laws," 37 *Calif L. Rev.* 341 (1949) 9
Weihofen, "Mental Health Services for the Poor," *The Law of the Poor,* 596 (1966) 33

In The

Supreme Court of the United States

October Term, 1969

No. 265

GLADYS BODDIE, et al.,

Appellants,

vs.

THE STATE OF CONNECTICUT, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Connecticut

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

The National Legal Aid and Defender Association files this Brief Amicus Curiae pursuant to the written consent of the parties submitted herewith.

INTEREST OF AMICUS CURIAE.

The National Legal Aid and Defender Association, hereinafter called NLADA, is a non-profit corporation

whose primary purpose is to assist in providing more and better legal services for the poor. Its members include the great majority of defender offices, coordinated assigned counsel systems, and legal aid societies in the United States. NLADA also has 1600 professional members, many of whom are practicing attorneys who represent indigent persons in criminal and civil matters.

NLADA and its members believe that each citizen, regardless of his social or economic status, is entitled to equal justice under law. In the case at bar, a United States District Court for the District of Connecticut (see text *infra* at 6) has upheld the State of Connecticut's fee and cost requirements as preconditions for initiating a divorce action. It is our contention that such a practice violates the constitutional rights of those too poor to pay.

The entire issue is of vital concern to members of NLADA, many of whom represent indigents in a variety of civil matters, including divorce actions. See Appendix B *infra*. NLADA urges a reversal of the judgment of the United States District Court for the District of Connecticut because we believe that an individual's meaningful right to gain initial access to a state's judicial forum is at the core of our system of justice. Providing legal representation for the poor is superfluous if the poor are not permitted to get into court.

In view of the direct importance of this case to legal aid attorneys serving the poor throughout the country, and to the poor themselves, the Executive Committee of NLADA has authorized and instructed NLADA's staff to prepare and file an amicus brief in this case.

OPINION BELOW.

Judgment of a three-judge United States District Court for the District of Connecticut entered July 17, 1968, denied an injunction which sought to restrain the enforcement of a state statute. The opinion of the three-judge District Court for the District of Connecticut is reported in 286 F. Supp. 968.

JURISDICTION.

The jurisdiction of this Court to review by appeal the judgment of the three-judge United States District Court for the District of Connecticut is conferred by 28 U.S.C. 1253. Probable jurisdiction was noted on June 23, 1969.

STATUTORY PROVISION INVOLVED.

Sec. 52-259 of the General Statutes of Connecticut as amended by Pub. Act 628, Sec. 3 (Conn. Gen. Stat. Ann., Vol. 25, 1967, Supp., p. 29):

Sec. 52-259 Court fees

"There shall be paid to the clerks of the supreme court or the superior court, for entering each civil

cause, forty-five dollars, and to the clerks of the court of common pleas for entering each civil cause, thirty dollars. There shall be paid to the clerk of each court, other than probate courts, by any party who requests a finding of fact by a judge of such court to be used on appeal, the sum of twenty dollars, to be paid at the time the request is filed. Such clerks shall also receive for receiving and filing an assessment of damages by appraisers of land taken for public use or the appointment of a commissioner of the superior court, two dollars; for recording the commission and oath of a notary public or certifying under seal to the official character of any magistrate, two dollars; for certifying under seal in verification of copies of files or records or whenever required by law, two dollars; for making all necessary records and certificates of naturalization, the fees allowed under the provisions of the United States statutes for such services; and for making copies, at the rate of fifty cents a page, except there shall be no charge for one plain or certified copy of a judgment to any party to the action.

QUESTION PRESENTED.

Does the State of Connecticut's refusal to waive court fees and costs for indigent persons deny these persons access to Connecticut's courts in violation of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE.

The NLADA adopts Appellants' Statement.

SUMMARY OF ARGUMENT.

The Fourteenth Amendment equal protection guarantee requires procedures by the state that do not permit discrimination between persons on the basis of their ability to bear the costs of litigation. In addition, the Fourteenth Amendment requires that no state "deprive any person of life, liberty, or property without due process of law." Connecticut has, by requiring that the poor pay filing fees and court costs in divorce actions, created two classes of prospective suitors—one class able to pay the necessary fees and costs and another class unable to do so because of their poverty. The practical effect of Connecticut's fee statute (Conn. Gen. Stat. Ann. Sec. 52-259), as applied to these appellants, is to bar them from Connecticut's divorce courts and to deny them the opportunity to secure a divorce solely because of their poverty. The Equal Protection Clause prohibits a classification that permits a man of means to gain access to a state court while denying the same opportunity to an indigent person. Similarly, an arbitrary denial of the right to terminate a marriage constitutes an extreme example of injustice that amounts to a serious deprivation of liberty within the meaning of the Due Process Clause.

ARGUMENT.

I.

THE STATE OF CONNECTICUT'S REFUSAL TO WAIVE COURT FEES AND COSTS FOR INDIGENT PERSONS WHO WISH TO INITIATE AN ACTION FOR DIVORCE EFFECTIVELY DENIES THESE PERSONS ACCESS TO CONNECTICUT'S COURTS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A.

The Equal Protection Clause Requires that Persons Should Not Be Denied Access to State Courts Because of Their Poverty.

1. Connecticut's Filing Fees and Court Costs Represent a Serious Financial Obstacle to Poor Persons Who Seek Access to the State's Courts.

The State of Connecticut requires that persons who wish to prosecute an action for divorce pay an "entry" (or filing) fee of forty-five dollars. *See* Conn. Gen. Stat. Ann. Sec. 52-259 as amended by Pub. Act 628, Sec. 3 (1967). In addition to this statutory filing fee, costs and expenses incident to a divorce proceeding in Connecticut include either the cost of service by sheriff (from "ten to fifteen dollars") or by publication ("one hundred dollars"). *See* brief for Plaintiff, p. 6, *Boddie, et al.* v. *Conn., et al.,* 286 F. Supp. 968 (D. Conn. 1968), and opinion of the three-judge federal District Court at 970. These fees and costs represent a serious financial obstable to the poor who wish to gain initial access to Connecticut's divorce courts.

In the case presently before this Court, all of appellants' applications to initiate divorce proceedings without payment of filing or service fees were rejected by the appellees. Connecticut has no statute permitting indigent persons to proceed *in forma pauperis* in civil actions.* The practical effect of Connecticut's refusal to waive filing and service fees, absent an *in forma pauperis* proceeding, is to deny indigent persons initial access to the courts and the right to seek a divorce.

2. Access to State Courts Is a Right of Fundamental Importance that Must Be Made Available to All Citizens Equally.

The Equal Protection Clause requires that Connecticut make available its courts to all citizens on an equal basis. Equal access does not exist where persons are denied access to Connecticut's courts because of their poverty. As early as 1885, this Court expressed its concern that ". . . equal protection and security . . . be given to all under like circumstances in the enjoyment of their personal and civil rights . . . [and] that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts . . ." *Barbier* v. *Connolly,* 113 U.S. 27, 31 (1885). The guaranty of equal protection requires that ". . . all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination."

---

* Twenty eight states permit indigent plaintiffs to proceed *in forma pauperis* in divorce actions. See Appendix A *infra.* In addition, a federal statute, 28 U.S.C. §1915 (1964), authorizes federal courts to allow civil litigants, as well as criminal appellants, to proceed *in forma pauperis* if they are ". . . unable to pay . . . costs or give security therefor."

Republic Pictures Corp. v. *Kappler,* 151 F. 2d 543, 547 (8th Cir. 1945), *affirmed* 327 U.S. 757 (1945).

In 1956, this Court held that an Illinois appellate scheme, wherein "full direct appellate review" could be had as a practical matter only if the defendant-appellant provided a trial transcript at his own expense, violated the Equal Protection Clause as to an indigent defendant by denying him the appeal that a wealthy litigant could afford. *Griffin* v. *Illinois,* 351 U.S. 12 (1956). This Court declared in *Griffin* that:

> "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy a transcript." *Id.* at 19.

Similarly, this Court has made it clear that the Equal Protection Clause requires that if a state provides an appeal to some it cannot deny it to others because of their inability to pay, even where such a denial can be rationally defended. *See Douglas* v. *California,* 372 U.S. 353 (1963).

The thrust of *Griffin* and *Douglas* is that the equal protection guaranty calls for procedures by the state that do not permit discrimination between persons on the basis of their ability to bear the costs of litigation. What is more, *Griffin* and *Douglas* make no distinction between intentional and unintentional forms of state discrimination. Rather, these two cases stand for the proposition that if a state perpetuates unintentional and accidental inequality affecting important rights of the poor, such action would be treated no differently, for purposes of the Equal Protection Clause, than any other kind of

premeditated and invidious discrimination. *See also Jeffreys* v. *Jeffreys*, 57 Misc. 2d 416, 296 N.Y.S. 2d 74, 85 (1968).

Connecticut has, by requiring that the poor pay filing fees and court costs, created two classes of prospective suitors—one class able to pay the necessary fees and costs, and the other class unable to do so because of their poverty. The ability of people to pay should never be the basis of a classification. In 1949, Joseph Tussman and Jacobus tenBroek recognized that:

> "The assertion of human equality is closely associated with the denial that differences in color or creed, birth or status, are significant or relevant to the way in which men should be treated . . . To these differences in the supplicants before her bar, Justice must be blind. Laws which classify men by color or creed or blood accordingly, are repugnant to the demand for equality, and therefore, such traits should not be made the basis for the classification of individuals in laws." Tussman and tenBroek, "The Equal Protection of the Laws." 37 *Calif. L. Rev.* 341, 353 (1949).

This Court has already recognized that laws which classify criminal defendants on the basis of wealth are "repugnant to the demand for equality" and that the ability of indigent defendants to pay should not be made the basis for a classification. *See* e.g. *Griffin* and *Douglas*, *supra*. What remains is for this Court to pronounce in clear and forthright language that equality is denied when classifications, based on the ability of persons to pay, are permitted to foreclose citizens from certain fundamental rights such as access to a state's divorce courts and the opportunity to secure a divorce. The practical effect of Connecticut's fee statute, as applied to

these appellants, is to bar them from Connecticut's divorce courts and to deny them the opportunity to secure a divorce solely because of their poverty.

3. Equal Protection Guaranties Apply to Civil Litigants as well as Criminal Defendants.

Nearly all of the relevant decisions from this Court applying the equal protection rationale of *Griffin* and *Douglas* afford specific relief from the handicap of indigence for criminal defendants. This should not serve to limit the application of the Equal Protection Clause to criminal cases. *See* e.g. *Eskridge* v. *Washington,* 357 U.S. 214 (1958), *Burns* v. *Ohio,* 360 U.S. 252 (1959) and *Smith* v. *Bennett,* 365 U.S. 708 (1961). See Argument II *infra* for a more detailed analysis of the possible application of the Equal Protection Clause in civil cases. ". . . [the] actual concerns of the poor do not reflect the law's sharp distinction between civil and criminal litigants." Note, "Indigent's Right to Counsel in Civil Cases," 76 *Yale L. J.* 545 (1967).

The "distinction" that has arisen between civil and criminal cases, for purposes of applying equal protection guaranties, might be attributed to the fact that until recently indigents rarely were found in civil courts. In most civil suits the traditional remedy sought was a money judgment, and indigents were not logical defendants in such suits. Also, indigents rarely resorted to the courts as plaintiffs because of both the expense of litigation and an unfamiliarity with the means of vindicating their rights. *See* Address by Attorney General Robert F. Kennedy, University of Chicago Law School, Law Day Address, May 1, 1964, quoted in Cahn & Cahn. "The War on Poverty: A Civilian Perspective," 73 *Yale L. J.* 1317, 1336-37, n. 27 (1964). *See* also Silverstein,

Defense of the Poor in American State Courts (1965). Perhaps another reason for the distinction drawn between the rights of indigent defendants and indigent civil litigants (particularly indigent plaintiffs) may be attributed to the belief, shared by many, that criminal cases, in which the state is always a party, present more compelling constitutional issues. *See* e.g. *Griffin* v. *Illinois*, *supra* at 23.

Whatever factors contributed toward fostering this distinction between civil and criminal litigants must, however, be held suspect today. Indigents, assisted by legal aid attorneys and *in forma pauperis* statutes, no longer shun civil litigation. The rights and interests involved in civil litigation are, in many instances, no less important than those involved in criminal litigation. *See* e.g. Appendix B *infra*, indicating the large volume of civil cases handled by legal aid attorneys. Indeed, the state often has a significant interest in the civil action.

For example, poor persons may arbitrarily be evicted from public housing, have their welfare payments cut off, or their children taken from them. They may even lose their liberty through civil commitment to a mental institution. *See* Note, "Indigent's Right to Counsel in Civil Cases," *supra* at 545. Conversely, poor persons may have vital interests that they can realize only as plaintiffs in a civil action. They may be able to suspend rent payments for housing code violations, protect their privacy and security against the arbitrary actions of welfare officials, or get a divorce, separation, support, or custody decree. *Id.* at 545, 546. It follows, therefore, that the principles of equal treatment for indigent and non-indigent persons enunciated in *Griffin* and its progeny must have equal application and importance in the case presently before this Court.

4. Divorce in Connecticut Clearly Is Marked with the Requisite State Interest.

There is little doubt that marriage and divorce in Connecticut are clearly marked with the public interest. The marriage relationship is closely regulated by the State both in its inception and dissolution. *See* e.g. Conn. Gen. Stat. Ann. Tit. 46. *See also Jeffreys* v. *Jeffreys*, *supra* at 87. Connecticut imposes substantial duties and confers substantial rights upon the parties to this relationship. One such right is to have the relationship terminated upon certain conditions. However, this "right" to have a marriage terminated can only occur with the consent of the state "for causes deemed to make probable the better service of the interests of society thereby." *Allen* v. *Allen*, 46 A. 242, 73 Conn. 54 (1900).

In Connecticut, a marriage cannot be dissolved except by resort to the State's courts. *See* Conn. Gen. Stat. Ann. Sec. 46-13, conferring exclusive jurisdiction of all divorce complaints in the superior courts of the State. It is abundantly clear that Connecticut has always regarded itself as an interested third party in every marriage and divorce action. Nevertheless, Connecticut has, by the application of its statutes (*see* Conn. Gen. Stat. Sec. 52-259) and by upholding the right of its courts and judicial officers to require additional fees in conjunction with a divorce action, created arbitrary and unjustified monetary hurdles for indigent persons who wish to secure a divorce.

5. Loss of Access to Connecticut's Divorce Courts Deprives Poor People of the Right to Seek a Divorce.

The loss of access to Connecticut's divorce courts (superior courts) is a denial of a right of substantial

magnitude. This denial is even more unpalatable because an individual may obtain the desired redress or relief only through these courts. To deny appellants access to Connecticut's divorce courts simply because they are unable to bear the costs of litigation is to deny them the substantive right to a divorce and thereby to create a discrimination for which there can be no justification. The decision of the three-judge federal district court, from which this appeal is taken, conceded that the appellants are effectively barred from bringing suit by requiring them to pay a filing fee and other incidental court costs. *See Boddie, et al.* v. *Conn., et al., supra* at 972. The court noted that ". . . it is plain that there is in effect a classification of prospective civil suitors between those able to afford the court costs and those unable to afford them." *Ibid.* However, the court refused to accept the notion that the right of access to civil courts to adjudicate one's marital status is "a right of great importance" comparable to those kinds of rights guaranteed by the Equal Protection Clause as enunciated in *Griffin. Ibid.*

It is hard to visualize a more sweeping deprivation of personal liberty and individual rights than Connecticut's effective foreclosure of the poor from uninhibited access to the State's divorce courts. The right of access to Connecticut's divorce courts and the right to seek a divorce are as basic as the right to appeal enunciated in *Griffin* or the right to vote expounded in *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966). See *Jeffreys* v. *Jeffreys, supra* at 87. It is manifestly discriminatory under *Griffin* standards to deprive the appellants of such rights while affording them to persons who have the money to pay the necessary fees and costs.

6. Connecticut Has No Legitimate Competing Interest to Support Distinctions Among Civil Suitors on the Basis of Wealth.

Connecticut has no legitimate competing interest to support a classification of prospective civil suitors that effectively bars poor suitors from her divorce courts. The classification neither promotes a "compelling" state interest, *see Shapiro* v. *Thompson, Washington* v. *Legrant*, and *Reynolds* v. *Smith*, ... U.S. ....., 89 S. Ct. 1322 (1969), nor a legitimate governmental objective. *See* e.g. *Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573, 578 (1938).

Only two state interests are served by requiring prospective litigants to pay for the right to use Connecticut's divorce courts—to provide "financial support for the court establishment . . . and [to discourage] resort to litigation in purely frivolous matters . . ." *See Boddie, et al.* v. *Conn., et al., supra* at 973. The three-judge federal district court addressed itself to Connecticut's revenue interest and noted that fees and costs support "perhap one-fifth" of Connecticut's court establishment. *Ibid.* This percentage appears to encompass revenues produced by fees and costs assessed in all civil actions and not simply those produced from fees and costs assessed incidental to divorce actions. Connecticut's reliance upon court fees and costs also is surprising in light of an American Bar Foundation study on systems of paying the cost of litigation that concluded "fees charged to litigants do not produce nearly enough revenue to operate the federal and state courts, [but] are so high as to constitute a substantial deterrent to the poor litigant if he must pay these expenses himself." *See* Silverstein, *Public Provisions for Costs and Expenses of Civil Litigation* 2-3 (1966).

Connecticut's economic interest in divorce actions probably is negligible, but even a small increase in Connecticut's general tax burden that might be necessitated by the State opening its divorce courts to the poor can hardly justify denying poor litigants initial access to the State's divorce courts. Also, requiring Connecticut to waive its fees and costs incidental to divorce actions "creates no remedy problems," for its court ". . . without legislative cooperation has the power both to enjoin the collection of a fee and to grant access to its forum." *See* Note, "Discriminations Against the Poor and the Fourteenth Amendment," 81 *Harv. L. Rev.* 435, 451 (1967).

We do not deny that Connecticut has a legitimate state interest in discouraging and perhaps deterring frivolous litigation. But denying access to state courts to those unable to pay the required costs and fees involved in divorce litigation excludes meritorious and frivolous claims alike. The situation is analogous to the one in *Douglas, supra,* where this Court concluded that, although California was pursuing the otherwise lawful objective of providing counsel for an appeal only for non-frivolous claims, it had created a situation in which the well-to-do could always have a lawyer—even for frivolous appeals —whereas the indigent could not. Similarly, in the case presently before this Court, although Connecticut may be pursuing the otherwise legitimate objective of trying to discourage frivolous litigation, it has, in effect, created a situation wherein those who can pay the necessary court costs and fees can always initiate an action for divorce—even a frivolous one—whereas the indigent cannot.

Griffin required non-discriminatory treatment with respect to satisfying what it took to be the interest really at stake—that of actually being able to acquire a transcript in order to bring an effective appeal. In the case presently before this Court the interest at stake is the right of all persons to have initial access to Connecticut's divorce courts and the opportunity to secure a divorce. Although Connecticut has not declared that an indigent person cannot initiate an action for divorce, it has, like Illinois (*Griffin*) and California (*Douglas*), ignored private inequalities of wealth in classifying prospective litigants.

7. The Constitution Prohibits Connecticut from Erecting Economic Barriers that Bar Poor Persons from an Initial Hearing on the Merits.

The economic barrier erected by Connecticut to its divorce courts arguably is a more invidious discrimination against the poor than the denial of a right to bring an effective appeal or even the failure to provide the poor with counsel. Here excessive court fees and costs prevent these appellants from having even a first hearing on the merits of their case. The effective result of such a policy is to deny indigent persons equal protection of the law by denying them access to Connecticut's divorce courts and the right to seek a divorce solely because of their poverty. *Griffin* acknowledges that laws or procedures that have the effect of discriminating against indigent persons (even if they appear to be neutral on their face) and that deny indigent persons equal protection of the laws are unconstitutional.

By requiring its citizens to post filing fees and pay certain court costs in order to gain access to its divorce courts, Connecticut is treating those who cannot meet

these financial requirements as second-class citizens. A state that provides justice through a system of courts and permits relief only through its courts cannot condition that grant upon the ability to pay of those who are intended to benefit from it. If ". . . it is now fundamental that, once established [avenues of appellate review] . . . must be kept free of unreasoned distinctions that can only impede open and equal access to the courts," *Williams* v. *Oklahoma City*, ... U.S. ....., 89 S. Ct. 1818, 1819 (1969), it follows that no hindrance or obstruction can impede a citizen's access to the courts for the purpose of obtaining an initial hearing on the merits. Connecticut's refusal in this case to waive the filing fees required by Conn. Gen. Stat. Ann. Sec. 52-259 and the other court costs incidental to an action for divorce and its refusal to permit the appellants to proceed *in forma pauperis* clearly resulted in a denial of access to Connecticut's divorce courts—a discrimination against the appellants based solely upon their poverty.

It is our contention that the constitutional guaranty of equal protection of the laws is not subject to a construction that allows a man of means to gain access to a state court while denying the same opportunity to the indigent. We agree with Mr. Justice Douglas that ". . . the promise of equal justice for all would be an empty phrase for the poor if the ability to obtain judicial relief were made to turn on the length of a person's purse." *Williams* v. *Shaffer*, 385 U.S. 1037 (1967) (Douglas, J., dissenting from denial of *certiorari*). Equal protection of the laws should not embrace procedures whereby access to the courts is made contingent upon an individual's ability to pay. Our state courts must be open to all—rich and poor alike.

B.

Due Process Requires that Poor Persons Be Guaranteed Access to a State's Divorce Court.

1. The Fourteenth Amendment Proscribes State Action that Deprives a Class of Citizens of Their Rights to Life, Liberty, and Property without Due Process of Law.

The Fourteenth Amendment requires that no state "deprive any person of life, liberty, or property without due process of law." U.S. Const., XIV Amendment, Sec. 1. The phrase "due process of law" has never been defined precisely by this Court perhaps because "due process of law conveys neither formal nor fixed nor narrow requirements." *See* Mr. Justice Frankfurter in *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949). In *Wolf*, Mr. Justice Frankfurter went on to observe that due process,

> ". . . is the compendious expression for all those rights which the courts must enforce because they are basic to our free society . . .
>
> "To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of 'inclusion and exclusion.'" *Ibid.*

More recently this Court defined due process of law as ". . . the primary and indispensable foundation of individual freedom . . . the basic and essential term in the social compact which defines the rights of the individual

and delimits the power which the state may exercise." *In re Gault,* 387 U.S. 1, 20 (1967). It is our contention that the Due Process Clause requires that all litigants, rich and poor alike, have equal access to state courts to vindicate their legal rights and that to deny appellants an opportunity to gain access to a legal forum amounts to a violation of a ". . . principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *See Palko* v. *Conn.,* 302 U.S. 319, 325 (1937).

There is no evidence to indicate that either the framers of the Fourteenth Amendment or this Court intended that initial access to state courts be conditioned upon an individual's social or economic status. On the other hand, there is a great deal of evidence to support the contention that the right of initial access to our nation's courts is deemed fundamental to life, liberty, and property and is protected by the Due Process Clause of the Fourteenth Amendment.

In 1883, this Court observed that ". . . any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good . . . must be held to be due process of law." *Hurtado* v. *California,* 110 U.S. 516, 537 (1883). Almost fifty years later this Court acknowledged the principle in *McKane* v. *Durston,* 153 U.S. 684 (1894), that the right to appeal *per se* is not essential to due process, "provided that due process has already been accorded in the tribunal of first instance." *See Ohio* v. *Akron Park District,* 281 U.S. 74, 80 (1929). The Court went on to say in *Ohio* v. *Akron Park District* that "The opportunity afforded to litigants in Ohio to contest all constitutional

and other questions fully in the Common Pleas Court . . . plainly satisfied the requirements of the Federal Constitution in this respect. . . ." *Ibid.*

Clearly the implications of the Court's language in *Hurtado* and *Ohio* v. *Akron Park District* is that no legal proceeding, or no opportunity to contest, is less than due process of law. Recent decisions of this Court reaffirm that an opportunity for hearing, or an opportunity to contest constitutional issues, are fundamental requisites of due process in civil litigation. *See* e.g. *Schroeder* v. *New York*, 371 U.S. 208 (1962). Due process requires that the poor not be deprived of all recourse to the courts. Their status as litigants, either as plaintiffs or defendants in civil actions, should make no difference in the application of the due process guaranty. *See* Recent Developments, "Poverty and Equal Access to the Courts: The Constitutionality of Summary Dispossess in Georgia," 20 *Stan. L. Rev.* 766, 780 (1966).

Connecticut's Constitution and courts would seem to be in agreement. Article I, Section 10, of the Connecticut Constitution provides:

> "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and rights and justice administered without sale, denial or delay."

A Connecticut court has construed this provision to mean that "it is the essence of the constitutional intention that the courts created in the constitution should be open and accessible to the people who may have occasion to seek their protection . . . and the general assembly has no power to forbid any person from entrance thereto." *Osborn* v. *Zoning Board of Appeals of City of Stan-*

ford, 11 Conn. Supp. 489 (1943). When read in conjunction with Connecticut's own constitutional guarantees that "no person shall be . . . deprived of life, liberty or property without due process of law" (*see* Connecticut Const. Art. I, Sec. 8), the State's failure to waive fee and cost requirements in this case amounts to nothing less than a denial of rights guaranteed to Connecticut's citizens under Article I, Section 10, *supra.* It also amounts to a deprivation by the State of Connecticut of life, liberty, and property within the meaning of the Due Process Clause of its own constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Rights Protected by the Fourteenth Amendment Guaranty of Due Process Are Not Confined to the Specific Terms of the Bill of Rights.

The term "liberty" as used in the Fifth and Fourteenth Amendments to the United States Constitution has been interpreted to ". . . [denote] not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923). In 1965, Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, filed a separate opinion in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965) and stated that the Fifth and Fourteenth Amendment expressions of "liberty" protects "those personal rights

that are fundamental and is not confined to the specific terms of the Bill of Rights." *Id.* at 486.

However, the view that a residuum of "fundamental personal rights" not enumerated in the Bill of Rights or elsewhere in the Constitution resides in the Fourteenth Amendment had been articulated long before *Griswold.* In 1883, this Court interpreted the Fourteenth Amendment as possessing guaranties of positive rights and privileges.

> "[The Fourteenth Amendment] . . . nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. . . . Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges. . . ." *Civil Rights Cases,* 109 U.S. 3, 11 (1883).

The proposition that the Fourteenth Amendment is not limited to protecting only those rights enumerated specifically in the terms of the Bill of Rights recently was reaffirmed by this Court in *Loving* v. *Virginia,* 388 U.S. 1 (1967). In striking down a state miscegenation statute as not only a violation of the Equal Protection Clause but also as a deprivation of "liberty without due process of law," the Court stated in *Loving* that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* at 13. The Court added:

> "Marriage is one of the 'basic civil rights of man' fundamental to our very existence and survival.

> . . . To deny this fundamental freedom on so unsupportable a basis as the racial classification embodied in these [miscegenation] statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the state's citizens of liberty without due process of law." *Ibid.*

It is our contention that the freedom to terminate a marriage relationship is as vital a personal right "essential to the orderly pursuit of happiness" as is the "freedom of choice to marry" enunciated in *Loving*. An arbitrary denial of such a right constitutes an extreme example of injustice that amounts to a serious deprivation of liberty within the meaning of the Due Process Clause. Both marriage and divorce are marked with the public interest. See p. 12, *supra,* and Appendix C *infra*. The fact that states, historically, "favor marriage" and do not favor divorces, *see e.g. Casale* v. *Casale,* 86 A. 2d 568, 138 Conn. 490 (1952), is immaterial when determining the constitutionality of a law or practice that diminishes the right itself.

Denying appellants the opportunity to seek a divorce (a right granted to everyone in the state of Connecticut) because of their inability to pay required fees and court costs is as "subversive of the principle of equality at the heart of the Fourteenth Amendment" as Virginia's invidious racial classification that restricted the freedom of its citizens to marry. Section 52-259 of the Connecticut General Statutes, as applied to the appellants, and Connecticut's refusal to waive other court costs incidental to gaining access to its divorce courts, restricts appellants' freedom to seek a divorce—a deprivation of their liberty without due process of law.

II.

THE EQUAL PROTECTION CLAUSE IS NOT LIMITED IN ITS APPLICATION TO CRIMINAL CASES.

The fundamental right of equal access to the courts for rich and poor alike was established in England more than 750 years ago. The Magna Carta decreed in 1215: "To no one will we sell, to no one will we deny, or delay, right or justice." By 1278, however, England had developed an operative costs system whereby a complainant had to pay for the opportunity to present his grievance to a judge. *See* Maguire, "Poverty and Civil Litigation," 36 *Harv. L. Rev.* 361, 366 (1936).

In order to fulfill the promise of equal justice granted by the Magna Carta, English courts assumed the power to waive costs and fees for paupers absent statutory authorization. Subsequent statutes such as II Hen. VII, c. 12 (1495), 23 Hen. VIII, c. 15 (1531), and Eliz. I, Instruction to Lord President and Council of the North (1603), specifically authorized waiver of costs and fees. *See* Maguire, *supra; Jeffreys* v. *Jeffreys, supra;* Comment, "Procedure: Suits In Forma Pauperis," 6 *Calif. L. Rev.* 226 (1918).

American states adopted the law of England and incorporated the Magna Carta's principle into their constitutions. *See* e.g. Art. I, Sec. 10 of Connecticut's Constitution, *supra.* Parallel to the development of the English system of costs and fees in civil actions, the states adopted their own individual costs and fee systems along with a variety of *in forma pauperis* procedures to provide relief for the poor. *See* e.g. Note, "Discriminations Against the Poor and the Fourteenth Amendment," *supra* at 15.

Frequently the question has arisen in those jurisdictions which do not have paupers' statutes of whether or not courts can grant relief to indigents without specific statutory authorization. Unlike the English courts, some state supreme courts have held that, in the absence of a statutory mandate, they cannot waive costs. [See *Campbell* v. *Chicago & Northwestern Ry.*, 23 Wis. 490 (1868); *In re Karen (Munkelwitz)* v. *Hennepin County Welfare District,* 276 Minn. 554, 150 N.W. 2d 24 (1967).] Many other jurisdictions, however, have recognized an inherent power to waive costs.

In the leading case of *Martin* v. *Superior Court of California,* 176 Cal. 289, 168 Pac. 135 (1917), the plaintiff was permitted to sue *in forma pauperis* for a wrongful death. The California Supreme Court held that the State had adopted the common law of England, including statutes such as II Hen. VII. In so doing, the Court reasoned:

> ". . . the power of the English common-law courts to remit fees on petition *in forma pauperis* did not have its origin in any statute, but was in fact exercised as one of the inherent powers of the courts themselves, quite independently of statute. And this one would naturally expect to find since, imperfect as was the ancient common-law system, harsh as it was in many of its methods and measures, it would strike one with surprise and to be credibly informed that the common-law courts of England shut their doors upon all poor suitors who could not pay fees, until Parliament came to their relief. Even greater would be the reproach to the system of jurisprudence of the State of California if it could be truly declared that in this twentieth century, by its Codes and statutes, it had said the same thing. . . ." *Id.* at 137.

See also Spalding v. *Bainbridge,* 12 R.I. 244 (1879); *M'Clenahan* v. *Thomas,* 6 N.C. (Murph.) 198 (1813); *Hickey* v. *Rhine,* 16 Tex. 576 (1856); *Shearman* v. *Pope,* 106 N.Y. 664, 12 N.E. 713 (1887); *Willis* v. *Willis,* 20 Pa. Dist. 720 (1911).* We contend that Connecticut's state courts have the inherent power to waive costs and fees, and erred by refusing to do so for the appellant.

Nearly all of the high court decisions affording relief from the hardships of indigency concern criminal defendants. In these decisions the constitutional doctrine providing relief from court expenses is based upon the Equal Protection Clause of the Fourteenth Amendment. In a series of cases dealing with the right of access to appellate courts either directly or collaterally to review judgments of conviction, this Court held that the Equal Protection Clause was violated by denial of appeal solely on account of a defendant's inability to pay. *See Griffin* v. *Illinois, Burns* v. *Ohio* and *Eskridge* v. *Washington, supra; Long* v. *District Court of Iowa,* 385 U.S. 192 (1966).

In *Smith* v. *Bennett,* 365 U.S. 708 (1961), the Court found it a denial of equal protection to require that indigent prisoners pay an initial $4.00 filing fees before they could petition for a writ of habeas corpus. This Court rejected the notion that merely because a proceeding is

---

* The *Willis* case is an example of the court's use of a constitutional provision similar to Conn. Const. Art. I, Sec. 10, as a basis for waiving court costs:

> "Our state constitution, section 11, art. 1, provides that 'all courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.' And that 'protects the poor man from having his day in court taken away because of a rule to give security for costs' . . . [citations omitted]." at 721.

called "civil" the protection of the Fourteenth Amendment is not available to prospective indigent litigants. The Court in *Bennett* refused to "quibble" as to whether a habeas corpus proceeding should be termed a civil or criminal action: "The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels." *Id.* at 712. *See also Barber* v. *Gladden*, 210 Ore. 46, 298 P. 2d 986 (1956).

Yet historically, the Equal Protection Clause has been applied more frequently in civil than in criminal actions. The Fourteenth Amendment is derived from the Civil Rights Act of 1866, now 42 U.S.C. 1981. That statute provides in specific terms for equal access to *civil* courts. *See Jeffreys* v. *Jeffreys, supra.*

In 1885, this Court indicated that the Equal Protection Clause is not limited to criminal cases. *See Barbier* v. *Connolly, supra.* More recently it has applied the *Griffin* principles in the case of *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966). The Court emphasized that "lines drawn on the basis of wealth or poverty, like those of race . . . are traditionally disfavored" (at 668) in holding that Virginia's poll tax statute violated the Equal Protection Clause. Stating that "lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment," the Court noted that "the affluence of any voter or payment of any fee" constituted such an impermissible line. *Id.* at 665-66.

The recent New York case of *Jeffreys* v. *Jeffreys, supra,* adopted a position similar to that taken by NLADA. That case involved the issue of whether or not statutes requiring payment of publication costs in a

divorce action denied the indigent plaintiff equal protection of the laws.

After discussing the history of *in forma pauperis* proceedings, Judge Nathan Sobel found that courts have an inherent power, derived from common law, to waive costs. He also found that there exists a fundamental right of equal access to the courts and that it is protected by the Fourteenth Amendment. He then cited *Griffin* as the controlling case.

In applying *Griffin's* principles to Mrs. Jeffrey's divorce case, Judge Sobel said:

> "*Griffin* adds a totally new perspective to the traditional concept of equal protection. It differs from earlier cases in that the state statute (or 'state action') did not discriminate on its face; nor did it seek to overclassify or underclassify or classify groups arbitrarily; nor though neutral in formulation, was its *application* by the state wilfully discriminatory. . . .
>
> "Moreover *Griffin* holds that distinctions based on wealth—at least those that discriminate against basic rights of the poor—are assimilated to distinctions based on race and like those will be *presumed* invalid." *Id.* at 84-85.

Judge Sobel went on to hold that New York's publication statutes invidiously discriminate against poor persons in matrimonial actions by denying them equal access to the courts pursuant to the guaranty of the Equal Protection Clause of the Fourteenth Amendment.

Griffin, Harper and *Jeffreys* evidence a balancing approach by the courts—whether the underlying right denied is of such substantial magnitude as to make it unjust and discriminatory for the state to impose a money

hurdle to the exercise of that right—the cost of trial transcript, a $1.50 poll tax, or the $300 cost of publication in a divorce.

It is our contention that the New York Supreme Court has adopted the correct position in divorce actions where indigent plaintiffs cannot pay fees and costs required by state statute. The *Griffin* doctrine should be applied in civil actions. The establishment by the State of Connecticut of civil courts for enforcing claims and vindicating legal rights is fundamental. Like Illinois and New York, Connecticut cannot be allowed to close its court system to persons because of their poverty.

Several Justices of this Court have indicated that they probably would concur with the reasoning of Judge Sobel in *Jeffreys*. In *Williams* v. *Shaffer, supra,* Mr. Justice Douglas, joined by Mr. Justice Brennan and Chief Justice Warren, stated:

> "This case . . . vividly demonstrates the disparity between the access of the affluent to the judicial machinery and that of the poor in violation of the Equal Protection Clause. . . .
>
> "The effect of the security statute is to grant an affluent tenant a hearing and to deny an indigent tenant a hearing. The ability to obtain a hearing is thus made to turn upon the tenant's wealth. On numerous occasions this Court has struck down financial limitations on the ability to obtain judicial review. . . . It is true that these cases have dealt with criminal proceedings. But the Equal Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters. I can see no more justification for denying an indigent a hearing in an eviction proceeding solely because of his poverty than for denying an

indigent . . . the right to obtain a transcript necessary for an appeal."

It is altogether appropriate, then, that this Court now adopt the position of the dissenting Justices in *Williams* v. *Shaffer* with regard to the application of the Equal Protection Clause to civil matters. By doing so, this Court will take a large step toward fulfilling the Magna Carta's ancient promise of equal justice for all people.

III.

FEE REQUIREMENTS IN DIVORCE ACTIONS THAT EFFECTIVELY BAR THE POOR FROM GAINING ACCESS TO A STATE'S DIVORCE COURT SERVE NO GOOD PUBLIC PURPOSE.

A.

Denying Divorce to Poor Persons Contributes to Social Disorganization.

1. Denying Divorce Encourages Informal Marriage Relationships.

A state that effectively precludes its poor citizens from divorce encourages desertion—"the poor man's divorce" —and "other and less formal marital relationships." *See* tenBroek, "California's Dual System of Family Law: Its Origin, Development and Present Status," 17 *Stan. L. Rev.* 614, 617 (1965). If states have an interest in the legality of the marriage relationship and in maintaining the stability of the family unit they do not promote these ends by denying divorces to the poor.

When civil relationships of marriage persist, though in fact the marriage has terminated, and the parties enter into temporary alliances (living together as man and wife with no intention to form a permanent relationship

and to assume permanent responsibilities for a family unit) or common law marriages (openly living together as man and wife without the trappings of the state's consent such as license, solemnization, and authentication) during the legal continuance of the prior marriage, "many concepts dependent upon the legality of the marriage relationship, such as bigamy, adultery, and, in part, legitimacy of offspring, are robbed of much of their traditional content." *See* tenBroek, "California's Dual System of Family Law," *supra* at 617; *see also The Negro Family* 9 (1965) (A Study Prepared by the Office of Policy Planning and Research, United States Department of Labor), where it is noted that in 1963 the non-white illegitimacy ratio in the United States was eight times the white ratio—based upon the number of illegitimate births per thousand. There exists a real danger that making divorce a "luxury" for the poor will help to undermine and eventually destroy the concept of a legal marriage relationship. Desertion, temporary alliance, and common law marriage not only reflect specific family breakdown, but they are the indicia of general social disruption. *See* Foster, "Common Law Divorce," 46 *Minn. L. Rev.* 43, 66 (1961) and Hammer, "Divorce Reform in California: The Governor's Commission on the Family and Beyond," 9 *Santa Clara Lawyer* 32, 55 (1968).

2. Denying Divorce Does Not Promote Family Stability.

By arbitrarily denying their poor the opportunity to obtain a divorce, states do not necessarily promote family stability. Family stability is not advanced by requiring the married parties to remain together under adverse and hostile circumstances. *See* Rheinstein, "The

Law of Divorce and the Problem of Marriage Stability," 9 *Vand. L. Rev.* 633 (1956). A divorce decree is not that event which "turns a woman into an abandoned wife" or suddenly converts a happy stable marriage into a broken home. *Id.* at 647.

"No decree of a divorce court has ever thrown a child into that position in which it is deprived of a home and of the love and care of its two parents. That deprivation is the effect of the factual break-up of the parents' marriage, but not of the decree of the divorce court by which the factual break-up of the marriage may or may not be followed." Rheinstein, "The Law of Divorce and the Problem of Marriage Stability," *supra* at 647. If a state is to effect the desired goal of having the law serve as an adequate substitute for self-help it must "be responsive to the needs of litigants and their families and recognize that no social gain is achieved by denying divorce when a marriage is in fact dead." Foster, "Common Law Divorce," *supra* at 68.

3. Denying Divorce May Have Other Far-reaching Collateral Social and Economic Consequences.

Denying the poor an opportunity to obtain divorce is, in effect, denying them an otherwise lawful and appropriate remedy to their problem. In so acting, states by implication are inviting poor persons either to continue with an intolerable *de jure* marital relationship, or one that is no longer maintained, or to find their own *de facto* remedy. Putting persons in such a dilemma serves no rational social or economic interest of the state. On the other hand, by permitting an unhealthy marital relationship to fester, the state is stoking the fires of family disintegration with potentially grave consequences for society as a whole.

In part, continued family disintegration can be evidenced by an increase in welfare dependency, *see* e.g. *Report of the National Advisory Commission on Civil Disorders* 458 (paperback ed. 1968) (hereinafter referred to as *Commission on Civil Disorders*), and juvenile delinquency, and, to a lesser degree, in the high incidence of mental illness and alcoholism among the poor. *See* Weihofen, "Mental Health Services for the Poor," *The Law of the Poor*, 596 (1966), and "Alcohol Project of the Emory University Department of Psychiatry," presented in the *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness*, 82 (Appendix G) (1967). The effect upon society of family breakdown might best be illustrated by looking at the mushrooming AFDC (Aid to Families with Dependent Children) Program and the root causes for juvenile delinquency.

The AFDC Program was first established in 1935 to care for widows and orphans, although the legislation contemplated coverage for all children in homes deprived of parental support because one or both of the parents were absent or incapacitated. *See The Negro Family, supra* at 12. But, "in fiscal year 1967, the total annual cost of the AFDC program, including federal, state and local contributions, was approximately $2.0 billion." See *Commission on Civil Disorder, supra* at 458.

At first, the number of AFDC families in which the father was absent because of desertion was less than a third of the total; however by 1960, it was two-thirds. The Department of Health, Education and Welfare estimated that between two-thirds and three-fifths of the 50 per cent increase between 1940 and 1955 in the number of absent-father families receiving aid for dependent children could be explained by an increase in broken

homes in the population. *See The Negro Family, supra* at 12. A 1962 California study of the AFDC Program indicated that

> "of a total of some 86,000 families receiving AFDC, some 77,000 were cases in which the father was absent from the home . . . of the total of 249,000 children receiving AFDC, 37.2%, 85,000 were born to parents never married to each other. Thus roughly 18,000 of the 77,000 absent-father families consisted of families in which divorces, annulments, and legal separations according to the forms of civil law had occurred. In all of the other families some essential civil law step was missing: the parents were never married to each other; there was a separation without a court decree; or there was desertion." *See* ten-Broek, "California's Dual System of Family Law," *supra* at 618.

Many studies have documented the effect of a broken home, or the personality effects of being raised in a disorganized home, upon delinquency. *See* e.g. Craig and Glick, "Ten Years Experience With the Glueck Social Prediction Table," 9 *Crime and Delinquency* 249, 256 (1963) and Scarpitti, Murray, Dinitz and Reckless, "The 'Good Boy' in a High Delinquency Area: Four Years Later," 25 *American Sociological Rev.* 555 (1960). Generally, the studies show that a higher portion of delinquent than non-delinquent children come from broken homes and that "good boys" in high delinquency neighborhoods typically come from exceptionally stable, intact families. *See Scarpitti, et al., supra* at 555-558.

It is clear that one cannot fully understand the causes for juvenile delinquency without first understanding the effect of family stability upon children. For example, in evaluating the effect of a broken home on a child, it has been noted that

"it is not so much the physical break in the home as the child's reaction to it that is important. The break itself may solve as much of the problem as it creates. A complete home that is marked by dissension may be psychologically and socially more broken than a physically broken one in which the remaining members of the family carry on as a close family unit." Barron, *The Juvenile Delinquent in Society* 138 (1960).

B.

Sound Public Policy Supports the Right of the Poor to Access to a State's Divorce Courts.

At a time when our nation appears preoccupied with combating violence and disrespect for the law by providing more effective legal assistance for the poor and more effective grievance-response devices to involve the poor in the decision-making process, denying the poor access to a state's civil courts is an anomaly. The National Advisory Commission on Civil Disorders cautioned against denying a class of citizens an opportunity to vindicate their legal rights in courts of law. See *Commission on Civil Disorders*, *supra* at 291-293. In addition, this Court has noted that,

". . . [u]nder the conditions of modern government, litigation may be the sole practicable avenue open to a minority to petition for redress of grievances." *NAACP* v. *Button*, 371 U.S. 415, 430 (1963).

Statutes, like Conn. Gen. Stat. Ann. Sec. 52-259, *supra*, that refuse to waive fees and other court costs effectively bar poor persons from the courts and the legal process. It is a self-defeating proposition for states to profess equality for all citizens but to deny the poor those fundamental rights that persons with money can enjoy.

CONCLUSION.

For the reasons stated, we respectfully submit that the judgment of the United States District Court for the District of Connecticut be reversed.

Respectfully submitted,

ALLAN ASHMAN,
BETTIE MCJUNKIN,
1155 E. 60th Street,
Chicago, Illinois 60637,

Attorneys for Amicus Curiae
NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION.

August 5, 1969

APPENDIX A

PROVISIONS FOR IN FORMA PAUPERIS PROCEEDINGS*

(Note: URESA means Uniform Reciprocal Enforcement of Support Act)

Alabama

No provision for waiver of costs for poor persons except for discretionary waiver of costs under URESA. *Ala. Code* tit. 34, § 119(b).

Alaska

Superior court may authorize appeal by poor person without payment of costs or giving of security. Trial court may waive payment of fees under URESA. Alaska Supreme Ct. Rule 43; Rules of Administration, Rule 15(b).

Arizona

Ordinarily a defendant may ask the court to order the plaintiff to give security for costs. Rule provides that if the plaintiff is a resident of Arizona and attests to his inability to give security, the court may vacate the order to give security. Statute allows extension of time for payment of court fees. Also discretionary waiver under URESA. *Ariz. Rev. Stat.* §§12-302, 12-1665; *Rules of Civil Procedure,* Rule 67(e). [$20 filing fee. No *in forma pauperis statute.*]

Arkansas

Statute provides for waiver of costs for poor plaintiff defined as person not worth $10 over and above neces-

* The material supplied in brackets was obtained from a questionnaire sent out to NLADA's member civil offices.

sary wearing apparel for self and family and excepting subject matter of action. Lawyer must make affidavit that plaintiff has a good cause of action. In URESA cases, waiver of fees is mandatory. *Ark. Stat. Ann.* §§27-401 to 406; 34-2415.

California

Right to proceed *in forma pauperis* recognized by judicial decision in absence of statute, applicable in superior and justice courts. For appeals, however, there is no procedure for waiver of clerk's and reporter's fees. Under URESA, waiver of fees is mandatory. *Civ. Pro. Code* §1677; Rules of Court for Appeals, Rules 4(c), 5(c); *Martin* v. *Superior Court*, 176 Cal. 289, 168 Pac. 135, (1917). [$27-35 filing fees and fees for service.]

Colorado

Statute allows poor person, as determined by judge, to sue or defend without payment of fees in any court in any civil action or special proceeding. Under URESA waiver of fees is mandatory. *Colo. Rev. Stat. Ann.* §§ 33-1-3, 43-2-15, 46-1-9. [$27 filing fee. For divorce cases *in forma pauperis* proceedings are for women only.]

Connecticut

Waiver of fees discretionary under URESA. *Conn. Gen. Stat. Ann.* §17-338. [$60.00 filing fee.]

Delaware

No general statute or case law authorizing proceedings *in forma pauperis*, but a special statute so provides as to appeals from a court order relating to custody of a child. No waiver of fees under URESA. *Del. Code Ann.*, tit. 10, §989.

District of Columbia

Statute authorized any United States citizen to sue or defend *in forma pauperis*. Court determines eligibility. Under URESA waiver of fees is discretionary. *D. C. Code Ann.* §§15.701, 15.703-704, 15.709-710, 15.712.

Florida

Statute allows actions *in forma pauperis* and appeals upon filing of affidavit of plaintiff and certificate of attorney as to good faith of claim. Under URESA waiver of fees is mandatory. *Fla. Stat. Ann.* §§57.081, 88.151.

Georgia

Statute authorizes any party in a civil action before superior court or lower courts to submit affidavit of inability to pay fees. Divorce actions are excluded. Separate statutes and rules of court provide for waiver of costs for appeals and mandamus proceedings. Under URESA waiver of fees is discretionary. *Ga. Code Ann.* §§24-3413, 24-3622, 24-3637, 24-4521, 6-203, 99-914a.

Hawaii

Statute provides in district court for waiver of costs in actions for $25 or less. No provisions for actions in court of general jurisdiction. Under URESA waiver of fees is discretionary. *Hawaii Rev. Stat.* §§229-8 to 11, 329-27; 607-3, 607-15, 607-23.

Idaho

Discretionary waiver of fees under URESA. *Idaho Code Ann.* §7-1062.

Illinois

Statute authorizes waiver of filing fee and sheriff's fees in all courts for plaintiffs and defendants. *Ill. Rev. Stat.* ch. 33, §5. [$35.50 filing fee. Incomplete *in forma pauperis* for divorce; must pay before final decree.]

Indiana

Statutes permit waiver of filing fee and other fees for plaintiff or defendant in superior circuit and probate courts. Separate provision excuses poor plaintiff from giving security for costs. Waiver of fees is mandatory under URESA. *Ind. Ann. Stat.* §§2-211, 2-212, 49-1305B, 3-3115.

Iowa

Discretionary waiver of fees under URESA. *Iowa Code Ann.* §252 A. 10 §§605.19, 605.23. [No state-wide *in forma pauperis*. Iowa City and Dubuque have such provisions. Waterloo does not. $15-30 for filing and service.]

Kansas

Statute allows poor person, by filing poverty affidavit and asserting that his claim is just, to be excused from making deposit as security for costs. Under URESA waiver of fees is mandatory. *Kan. Stat. Ann.* §60-1002; 23-432. §60-2001(a)-(b).

Kentucky

Statute authorizes court to allow a Kentucky resident to prosecute or defend without payment of fees to court officials. In URESA cases waiver of fees is discretionary. *Ky. Rev. Stat. Ann.* §§453.190, 407.220. [$25 filing fee. Court clerks balk at *in forma pauperis* because the state makes no provision to pay them.]

Louisiana

Statute authorizes any poor person to sue or defend without payment of fees in any civil action except divorce and separation. He must file an affidavit of poverty and a confirming affidavit of a second person. A poor person has the right to appeal without costs or furnishing appeal bond. Under URESA waiver of fees is discretionary. *La. Rev. Stat.* §13:1673. [$25 filing fee.]

Maine

Discretionary waiver of fees under URESA. *Me. Rev. Stat. Ann.*, tit. 19, §398.

Maryland

Discretionary waiver of fees under URESA. *Md. Ann. Code* Art. 89C, §§11(b), 11(c), 15.

Massachusetts

No provision for proceedings *in forma pauperis*, except under URESA. In such actions plaintiff must allege, inter alia, that her total assets do not exceed $100 apart from clothes, household goods, and tools of trade. No waiver of fees required by responding state. *Mass. Ann. Laws* ch. 273A, §15. [$15 filing fee and $10 service fee or $25 publication.]

Michigan

Ordinarily, plaintiff in any civil action may be required to give bond for costs in trial court or in both trial and appellate courts. However, a plaintiff who shows by affidavit that he cannot afford to make bond and whose complaint states a meritorious claim may be allowed to proceed without giving bond. Under URESA waiver of fees is discretionary. Gen. Ct. Rule 109(1).

Separate provision authorizes a poor person to obtain a stay of proceedings without giving bond. Separate statute authorizes judge to excuse security for costs in any claim for labor done. *Mich. Stat. Ann.* §27A.2605, §27A.-6703. [$32-43 fees.]

Minnesota

No general provision for proceedings *in forma pauperis*. Usually non-residents are required to post $75 bond for costs in district court, but by statute this does not apply in actions to recover wages or other claims for personal services. Under URESA waiver of fees is discretionary. *Minn. Stat. Ann.* §§549.18, 518.49.

Mississippi

Statute excuses poor plaintiffs who are state citizens from paying court costs or giving security for costs. Under URESA waiver of costs is discretionary. *Miss. Code Ann.* §§1574-1576, 456-14. [$5 filing fee.]

Missouri

Statute authorizes plaintiffs to sue in circuit court without payment of fees, taxes or charges. Separate pro-

vision for magistrates' courts authorizes magistrate to waive requirement of security for costs if he finds plaintiff is a poor person. Under URESA waiver of fees is mandatory. *Mo. Ann. Stat.* §§514.040, 514.050, 514.360; 454.150.

Montana

Statute authorizes poor plaintiff to sue in any civil court without paying costs or giving security. Under URESA plaintiff must pay usual filing fee of $5, but all other fees may be excused unless court finds that complaint was filed in bad faith. *Mont. Rev. Codes Ann.* §§93-8625, 93-2601-17, 21-148. [A poor woman may sue for divorce without costs upon taking a pauper's oath.]

Nebraska

Waiver of fees is discretionary under URESA. *Neb. Rev. Stat.* §26-113.

Nevada

Waiver of fees is discretionary under URESA. *Nev. Rev. Stat.* §§12.0-15, 65.040. [*In forma pauperis* exists but has not been tested.]

New Hampshire

Waiver of fees is mandatory in URESA cases. *N.H. Rev. Stat. Ann.* §546:15, 546:11, 546:14. [$150 down payment toward $250-$300 fee. Costs may be waived.]

New Jersey

Costs may be disallowed in the discretion of the court to any party in any action or proceeding. N.J.S.A. 2A:15-59. [$35 filing fee. Representation by a legal aid attorney automatically waives fees.]

New Mexico

Statute provides waiver of court costs upon filing affidavit of poverty. Separate statute allows poor plaintiff or defendant a free jury trial. In URESA cases waiver of fees is discretionary. *Stat. Ann.* §§25-1-4, 21-8-17, 22-19-14.

New York

Statute authorizes any poor litigant to sue or defend in trial or appellate court upon motion supported by affidavit of poverty. Separate statute for justice court authorizes waiver of costs for poor plaintiff who states that he is not worth more than $100 besides wearing apparel and furniture necessary for himself and family. Under Uniform Support of Dependents Law, county pays for stenographic services and certification of records. Civil Practice Law & Rules §§1101 to 1103; Justice Court Act §§ 37 to 43; Domestic Relations Law § 40. [New York City: $5 filing fee, $25 calendar fee.]

North Carolina

Statute authorizes judge or clerk of superior court to permit a person to sue "as a pauper" when he proves by one or more witnesses that he has a good cause of action and makes affidavit that he cannot afford the $200 security bond or cash deposit required in all civil cases. Separate provision authorizes a pauper's appeal. *N.C. Gen. Stat.* §§1-110, 1-112, 1-288, 6-24, 52A-11.1. *M'Clenahan* v. *Thomas*, 6 N.C. 198 (1813).

North Dakota

Under URESA waiver of fees is discretionary.

Ohio

Statutes permit clerk to excuse poor persons from depositing cash or security for costs. Statute covers only security for costs or prepayment of costs, however, and in practice the costs must be paid before a judgment can be entered. Under URESA waiver of fees is discretionary. *Ohio Rev. Code Ann.* §§2323.30, 2323.31, 3115.16. [$7 court costs, $5-$50 filing fees; $100 minimum retainer.]

Oklahoma

Statute provides that no bond, security, or cash deposit shall be required of a plaintiff who makes affidavit that he has a just cause of action and is unable to pay

expense of bond. Under URESA waiver of fees is mandatory. *Okla. Stat. Ann.*, tit. 12, §§921, 1600.15. [Minimum court deposits $15-$28.]

Oregon

Statute allows a plaintiff or appellant to file a pauper's affidavit and be excused from payment of trial fee in trial or appellate court. Statute does not apply to sheriff's fee, library fee, reporter's fee, etc. Under URESA local fees are waived but those of responding state are not. *Ore. Rev. Stat.* §§21.600(2), 110.141. [$40 filing and service fees. Complete *in forma pauperis* statute effective August 23, 1969.]

Pennsylvania

Under URESA waiver of fees is mandatory. Superior Court permits appellant to appeal *in forma pauperis* upon filing of sworn financial statement showing income and ownership of property. *Pa. Stat.* tit. 62, §2043.15; Superior Court Rule 51. [95% of all court costs in the State must be deposited. Johnstown, Pa.—$155.50—no pauperis provision. Pittsburgh—$80-125—no provisions. Lancaster—*In forma pauperis* in statute only. The courts have refused to allow it. Philadelphia—allowed on a case by case basis.]

Puerto Rico

Statute permits resident plaintiff and any defendant to be excused from paying fees in any civil action. Separate statute provides for typewritten copy of record without costs. Discretionary waiver of fees under URESA. *P.R. Laws Ann.* tit. 32, §§1482, 1489, 3313g.

Rhode Island

Right to proceed *in forma pauperis* recognized by judicial decision in absence of statute. Costs are waived upon a showing by plaintiff that he is poor and that he has a probable cause of action. Const., Art. 1, §5; *Spalding* v. *Bainbridge*, 12 R.I. 244 (1879).

Statute provides that clients of Legal Aid Society shall not be required to pay any fees to the superior or district courts for services of clerks or sheriffs. No specific waiver of fees under URESA. *R.I. Gen. Laws Ann.* §9-29-14.

South Carolina

Statute, applicable only to two counties, authorizes plaintiff to sue with remission of court costs in any civil action. Under URESA fees may be waived in all counties. *S.C. Code Ann.* §10-604.

South Dakota

No general provision for proceeding *in forma pauperis*. A special statute authorizes such a proceeding upon application for writ of habeas corpus. Under URESA waiver of fees is discretionary. *S.D. Code* §§37.5504-1, 14-0815.

Tennessee

Statute authorizes *in forma pauperis* proceeding by resident plaintiff, excepting absolute divorce, false imprisonment, slander, or malicious prosecution. In an absolute divorce case, clerk may accept $10 deposit in lieu of security for costs if plaintiff is a woman. Separate provisions for actions *in forma pauperis* on behalf of infants, incompetents, and decedents' estates. Under URESA waiver of fees is mandatory. *Tenn. Code Ann.* §§20-1629 to 1635; 29-201, 36-914. [$12 filing fee for wife—$27 filing fee for husband.]

Texas

Statutes and rules authorize poor person to sue or defend without paying usual fees or giving security for costs in various courts. Under URESA waiver of fees is discretionary. *Tex. Civil Stats.*, Arts. 1917, 1958, §2328b-3; subsecs. 8, 15; Rules of Civil Procedure, 145, 217, 334, 355, 380, 444, 485, 508, 572.

United States

Statute authorizes any United States court to waive fees for poor persons in trial court or on appeal.

Separate statute authorizes furnishing of stenographic transcript for appeal "if the trial judge or a circuit judge certifies that the appeal is not frivolous but presents a substantial question." 28 U.S.C. 1915, 1916.

Utah

Statute authorizes proceedings *in forma pauperis* by plaintiff or defendant in all courts. He must file affidavit showing poverty and that he believes he has a good claim or defense. Under URESA waiver of fees is mandatory. *Utah Code Ann.* §§21-7-3 to 21-7-7, 77-61a-15.

Vermont

Waiver of fees under URESA is discretionary. *Vt. Stat. Ann.*, tit. 15, §258.

Virginia

Statute authorizes court to permit any poor person to sue or defend a suit without paying fees or costs. No specific provision for waiver of fees under URESA. *Va. Code Ann.* §14.1-183.

Washington

Waiver of fees under URESA is mandatory. *Wash. Rev. Code Ann.* §26.21.102. [$16 filing fee; $250 minimum bar fee.]

West Virginia

Statute permits plaintiff or defendant to sue or defend without payment of fees upon filing affidavit of poverty. Separate statute permits waiver of costs in trial or appellate court if party files a statement of poverty with certification by chief executive officer of a legal aid society. No provision for waiver of costs under URESA. *W.Va. Code Ann.* §§59-2-1, 59-1-36.

Wisconsin

Statute authorizes any party, upon filing affidavit of poverty, to be excused from giving security for costs in trial or appellate court. Affidavit must also allege that claim or defense is well founded and briefly describe claim or defense. Under URESA waiver of fees is discretionary. *Wis. Stat. Ann.* §§271.29, 52.10(14). [$7 state suit tax and county filing fee.]

Wyoming

No filing fee required under URESA and other fees may be waived. *Wyo. Stat. Ann.* § 20.91 [$5 filing fee.]

APPENDIX B

CASELOAD STATISTICS*

January 1 — June 30, 1969

State and City	Total New	Total Divorce	Percentage
Arizona			
Florence	329	50	15.1
Phoenix	1454	297	20.4
Tucson	1187	217	18.2
Arkansas			
Little Rock	281	94	33.4
Newport	71	14	19.7
California			
Fresno	541	85	15.7
Los Angeles, L.A.S.	1990	540	27.1
Napa	272	59	21.6
Pasadena	448	161	35.9
Redwood City	915	203	22.1
Sacramento	1088	185	17.0
San Francisco L.A.	3399	474	13.9
San Francisco L.A.S.	2514	373	14.8
San Jose	1575	331	21.0
Stockton	1131	400	35.3

* This data was gathered from the official reports of NLADA's member civil offices. The figures represent essentially the total number of new civil actions because personnel in a legal services program may not represent any person indicted (or proceeded against by information) for the commission of a crime. See Sec. 222(a)(3), Economic Opportunity Act.

State and City	Total New	Total Divorce	Percentage
Colorado			
Colorado Springs	345	75	21.7
Denver	2086	652	31.2
Pueblo	419	77	18.3
Connecticut			
Middleton	126	35	27.7
Norwich	343	82	23.9
Willimantic	304	96	31.5
Florida			
Jacksonville	834	236	28.2
Miami	733	184	25.1
Tampa	225	2	.8
Georgia			
Atlanta	3822	577	15.0
Savannah	128	0	0
Hawaii			
Honolulu	804	213	26.4
Idaho			
Lewiston	134	51	38.0
Illinois			
E. St. Louis	437	142	32.4
Peoria	428	178	41.3
Indiana			
Fort Wayne	226	18	7.9
Gary	593	178	30.0
Iowa			
Dubuque	113	30	26.5
Iowa City	257	34	9.5
Waterloo	392	79	20.1
Kansas			
Kansas City	395	74	18.7

State and City	Total New	Total Divorce	Percentage
Louisiana			
Alexandria	318	46	14.4
Baton Rouge	372	84	22.5
Tallulah	67	14	20.8
Michigan			
Battle Creek	368	94	25.5
Bay City	239	59	24.6
Benton Harbor	186	63	33.8
Eloise	410	160	39.0
Escanaba	515	91	17.6
Grand Rapids	1012	274	27.0
Lansing	314	105	33.4
Mt. Clemens	668	146	21.8
Saginaw	8	2	25.0
Minnesota			
St. Paul	837	283	33.8
Mississippi			
Clarksdale	184	8	4.3
Missouri			
St. Louis	1426	276	19.3
Montana			
Helena	1759	351	19.9
Nebraska			
Omaha	462	154	33.3
Nevada			
Las Vegas	253	3	1.1
Reno	73	2	2.7
New Hampshire			
Littleton	358	97	27.0

State and City	Total New	Total Divorce	Percentage
New Jersey			
Camden	866	114	13.1
Elizabeth	456	101	22.1
New Brunswick	1016	230	22.6
New Mexico			
Albuquerque	823	186	22.7
Bernalillo	129	16	12.4
New York			
Binghamton	229	106	46.2
New York City	191	37	19.3
Niagara Falls	603	228	37.8
Utica	468	97	20.7
North Carolina			
Charlotte	450	66	14.6
Winston-Salem	335	58	17.3
Ohio			
Canton	361	137	37.9
Cincinnati	2652	594	22.3
Columbus	1534	216	14.0
Portsmouth	205	71	34.6
Toledo	669	156	23.3
Oklahoma			
Jay	252	61	24.2
Oregon			
Eugene	227	63	27.7
Portland	1372	405	29.5
Pennsylvania			
Chester	657	—	—
Johnstown	176	14	7.9
Washington	84	11	13.0
Puerto Rico	4322	657	15.2

State and City	Total New	Total Divorce	Percentage
South Carolina			
Greenville	367	59	16.0
Tennessee			
Knoxville	314	128	40.7
Texas			
Austin	598	129	21.5
Corpus Christi	538	48	8.9
Dallas	1004	356	35.4
Houston	1225	530	43.2
San Antonio	1456	413	28.3
Waco	331	47	14.1
Utah			
Ogden	398	123	30.9
Virginia			
Roanoke	235	52	22.1
Washington			
Seattle	208	38	18.2
Wyoming			
Cheyenne	126	22	17.4

APPENDIX C

THE INTEREST OF SELECTED STATES IN DIVORCE PROCEEDINGS

"Marriage . . . is regulated . . . and can be dissolved only through the sovereign power of the state, whenever justice to either or both parties or the welfare of the public demands it." Arizona: *Forsythe* v. *Paschal*, 271 P. 865, 866 (1920).

"The Legislature . . . determines the grounds for, and the defenses against, divorce; because divorce is always regulated by statute." Arkansas: *Young* v. *Young*, 178 S.W. 2d 994, 997 (1944).

"The State, while not a party in a divorce action, has an interest in the contract and relationship of marriage, which is not subject to dissolution upon the whim or caprice of one of the contracting parties or even upon their mutual consent. It may be dissolved only for causes sanctioned by law." California: *Ex parte Lazar*, 99 P. 2d 342, 343 (1940).

"It is true that the state has an interest in every action where a divorce is sought to make sure that the attempt will not prevail without sufficient and lawful cause, shown by the facts of the case. [Citations omitted]" Connecticut: *Barton* v. *Barton*, 196 A. 141, 144 (1937).

"In the interest of public welfare, the state becomes a third party to any divorce proceeding." Florida: *Wall* v. *Wall*, 134 So. 2d 288, 289 (1961).

Georgia: "EX PARTE CASES, DUTY OF JUDGES IN.—In divorce cases proceeding undefended by the opposite party the judge shall see that the grounds are legal and sustained by proof, or shall appoint the solicitor general or some other attorney of the court to discharge that duty for him." Ga. Code Ann. §30-129.

"The State, as the sovereign, has an interest in maintaining the integrity and permanency of the marriage relation . . . In all divorce suits the public occupies the position of a third party." Illinois: *Ollman* v. *Ollman*, 71 N.E. 2d 50, 53 (1947).

Indiana: "WHEN PROSECUTOR TO RESIST.—Whenever a petition for divorce remains undefended, it shall be the duty of the proper circuit or district prosecuting attorney to appear and resist such petition." Ind. Stat. Ann. §3-1212.

"The integrity and permanence of the marital relation is of such vital importance to the welfare of society and to the public generally that the sovereignty or State has always deeply interested itself in all matters pertaining to the dissolution of that relation. While the suit for divorce is nominally between the two parties, the State is always a quasi party." Iowa: *Hopping* v. *Hopping*, 10 N.W. 2d 87, 89-90 (1943).

"The right to apply for or obtain a divorce is not a natural right, but one conferred only by statute." Louisiana: *Stallings* v. *Stallings*, 148 So. 687, 689 (1933).

"The State is a party to every divorce action and has a well defined interest in the continuance of the marriage relationship on the grounds of public policy. Public policy should be and is one of the prime considerations in considering all procedures relating to divorce and is of extreme importance in its application to all aspects of actions of divorce." Maine: *Deblois* v. *Deblois*, 177 A. 2d 199, 202 (1962).

"It is recognized that the marriage relation is a status based upon public necessity and controlled by law for the benefit of society. Although a divorce proceeding appears as a controversy between husband and wife, the State occupies the position of a third party to the contract, and it is always the duty of the courts to guard the marriage relation." Maryland: *Lickle* v. *Boone*, 51 A. 2d 162, 164 (1947).

"The state is a party to every divorce proceeding, and it alone, speaking through its courts, determines what, if any, relief shall be given." Michigan: *Kelly* v. *Kelly*, 233 N.W. 170, 171 (1930).

"It is important to society, as represented by the state, that the marital status be preserved and the rights of children protected. Therefore the state is an interested party in a divorce action.

"The proper regulation and control of the marriage relation is of so much importance to society, the well being of the community is so far involved in the permanence of this relation, that the state, through its courts, *exercises a peculiar guardianship over marriage and divorce.*" Minnesota: *Cahaley* v. *Cahaley*, 12 N.W. 2d 182, 184 (1943).

"Society, represented by the state, has an interest in every marriage and is a party to every action for divorce." Missouri: *Wagner* v. *Shelly*, 235 S.W. 2d 414, 417 (1950).

". . . the state never stands indifferent, but is always a party [in an action dissolving marriage] whose interest must be taken into account." Nebraska: *Willits* v. *Willits*, 107 N.W. 379, 380 (1906).

"It is indisputably the law here that the power of the Court to decree a divorce is entirely statutory." New Hampshire: *Rockwood* v. *Rockwood*, 194 A. 2d 771, 772 (1963).

". . . in divorce cases the state is a party whose interest the court at all times will save and protect . . . And as the law favors marriage and disfavors divorce, the court will do nothing to facilitate the latter, but will only dissolve the marriage relation where the complaining party is strictly entitled to a decree." New Jersey: *Rinehart* v. *Rinehart*, 110 A. 29, 30 (1920).

"The right to obtain a divorce is not a natural one but is accorded only by reason of statute, and the state has a right to determine who are entitled to use its courts for that purpose and upon what conditions they may do so." New Mexico: *Chaney* v. *Chaney*, 201 P. 2d 782, 784 (1949).

". . . there is no common law of divorce in New York state. Divorce law in New York is wholly statutory." New York: *Borenstein* v. *Borenstein*, 270 N.Y.S. 688, 689-690 (1934).

"Because of the interest of the State in the continuance of the marriage relation, our statutes require that, even though the defendant should default, there must be an actual trial of every divorce action. . . ." North Dakota: *Schillerstrom* v. *Schillerstrom*, 32 N.W. 2d 106, 109 (1948).

". . . a divorce proceeding is sui generis, and necessarily triangular in its nature, consisting of the plaintiff, the defendant, and the state . . . Although not named in the pleadings in the first instance, the state, or the public, is interested in the result . . . and [this policy] is on the theory that, as citizens of the state, the children and relatives of the parties have an interest in the proceedings; and, since they cannot become parties to the suit, it is essential that their interests be represented by the court." Oregon: *Parrish* v. *Parrish*, 96 P. 1066, 1067 (1908).

"An action in divorce is of such a character that the Commonwealth is an interested party to the extent that the morals of the community be safeguarded and justice be granted to each of the contending parties and their children, if there be children of the marriage." Pennsylvania: *Krammas* v. *Krammas*, 8 Sch. Reg. 171 (1941).

"Whether a decree of divorce will be pronounced . . . involves an exercise of some discretion on the part of the judge or chancellor, effected in some measure by considerations of public policy." Tennessee: *Parks* v. *Parks*, 11 S.W. 2d 680, 682 (1928).

"By the laws of Texas, marriage is a civil contract . . . The statutes prescribe the grounds upon which that contract may be dissolved." Texas: *Wilemon* v. *Wilemon*, 250 S.W. 1010, 1012 (1923).

"It is elementary, of course, that neither courts of law or equity have any inherent power to dissolve marriage. The power to decree a divorce is absolutely statutory." Virginia: *Blankenship* v. *Blankenship*, 100 S.E. 538, 539 (1919).

"Statutory recognition that the state is an interested party in every divorce suit is provided by RCW 26.08.080. . . ." Washington: *Chamberlin* v. *Chamberlin*, 270 P. 2d 464, 472 (1954).

"The courts of equity have jurisdiction to entertain divorce cases only by reason of the statute conferring that jurisdiction . . . and it is well within legislative power to throw strict safeguards around judicial severance of the marriage contract. . . ." West Virginia: *Parks* v. *Parks*, 153 S.E. 242, 243 (1930).

"That the dissolution of the marriage by divorce is a matter wherein public interest as well as the particular private interests of the immediate parties are concerned is a firmly established doctrine." Wisconsin: *Weichers* v. *Weichers*, 221 N.W. 733, 734 (1928).

"It is elementary that the statutory grounds of divorce are exclusive, the courts having authority in this field to do that only which is prescribed by the legislature." Wyoming: *Logan* v. *Logan*, 396 P. 2d 198, 199 (1964).

FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 20 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~265~~ 27

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,

Appellants,

vs.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLANTS

ARTHUR B. LAFRANCE, Esq.
New Haven Legal Assistance Association
Mailing Address:
College of Law
Arizona State University
Tempe, Arizona 85281

INDEX

SUBJECT INDEX

	Page
Table of Citations	iii
Opinion Below	1
Jurisdiction of This Court	2
Provisions of the United States Constitution	2
Statute Involved	3
Question Presented	4
Statement of the Case	4
Summary of Argument	6
Argument	8
I. The Court Costs of a Divorce Proceeding in Connecticut Are a Substantial Barrier to Litigation	8
II. These Indigent Appellants Are Barred From Connecticut Courts by Their Inability to Pay Court Costs	9
III. Appellants Were Denied Equal Protection of the Laws When They Were Denied Access to the Courts Solely Because of Their Poverty	15
A. The Equal Protection Clause Forbids Economic Discrimination in the Extension of Significant Rights	15
B. The Rights of Divorce, Remarriage and Procreation, All Involved Here, Are Sufficiently Significant to Come Within the Ambit of the Equal Protection Clause	24

Page

IV. Appellants Were Denied Due Process of Laws When They Were Denied the Opportunity to Petition for Redress of Grievances 26

A. The Right to Petition for Redress of Grievances Is an Element of Due Process 26

B. The Right of a Poor Person to Petition for Redress of Grievances Without Payment of Court Costs Is Deeply Rooted in the Common Law Which Preceded the United States Constitution's Guarantee of Due Process 30

V. Connecticut's Requirement That These Indigent Appellants Pay Court Costs Which They Cannot Afford Is Not a Permissible Exercise of the Police Power 38

A. A Classification Based Upon Economic Discrimination Is Disfavored and Must Be Both Necessary and Reasonably Related to the Objectives Sought 38

B. There Is No Necessity or Rational Basis for Barring Litigation by the Poor 42

C. Barring Divorce Actions Has Destructive Consequences Upon the Family Units of the Poor 45

VI. The Relief Sought by Appellants Could Properly Have Been Rendered by the Court Below 49

Conclusion 54

TABLE OF AUTHORITIES

Page

CASES:

American

Adkins v. *DuPont*, 335 U.S. 331 (1948) 9, 37

Baker v. *Carr*, 369 U.S. 186 (1962) 53
Boddie v. *Connecticut*, 286 F. Supp. 968 (D. Conn. 1968) 1, 44
Brotherhood of Railroad Trainmen v. *Virginia*, 377 U.S. 1 (1964) 16, 26, 28
Brown v. *Board of Education*, 347 U.S. 483 (1954) 53
Burns v. *Ohio*, 360 U.S. 252 (1959) 14, 17, 42-43, 45

Campbell v. *Chicago & Northwestern Ry.*, 23 Wis. 490 (1868) 34
Carrington v. *Rash*, 380 U.S. 89 (1965) 40
Chambers v. *Balt. & Ohio R.R.*, 207 U.S. 142 (1907) 28, 30
County of Sutter v. *Superior Court*, 53 Cal. Rptr. 424 (1966) 37
Cunha v. *Cunha*, 44 D. & C. 2d 230 (Pa. 1968) 34

Edwards v. *California*, 314 U.S. 160 (1941) 15

Gideon v. *Wainwright*, 372 U.S. 335 (1963) 43, 45, 53
Griffin v. *Illinois*, 351 U.S. 12 (1956) 16, 17, 19, 20, 22, 24, 26, 42, 50, 53, 54

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 25

Harper v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966) 14, 16, 38
Hernandez v. *Texas*, 347 U.S. 475 (1954) 39
Hickey v. *Rhine*, 16 Tex. 577 (1856) 34, 35

Isrin v. *Superior Court*, 45 Cal. Rptr. 320 (1965) 37

Page

Jack v. *Admrs. of McClure*, 26 Pa. Cty. Ct. 59 (1901) 34
Jeffreys v. *Jeffreys*, 296 N.Y.S. 2d 74 (Sup. Ct. Kings Cty., 1968) 19

Lane v. *Brown*, 372 U.S. 477 (1962) 18
Levy v. *Louisiana*, 391 U.S. 68 (1968) 25
Long v. *District Court of Iowa*, 385 U.S. 192 (1966) 18, 19
Loving v. *Virginia*, 388 U.S. 1 (1967) 25, 29

Majors v. *Superior Court*, 181 Cal. 270 (1919) 35
Martin v. *Superior Court*, 176 Cal. 289 (1917)..34, 35, 36
McDonald v. *Bd. of Election Commissioners*, 394 U.S. 802 (1969) 40
M'Clenahan v. *Thomas*, 6 N.C. (Murph.) 247 (1813) 34, 35
McLaughlin v. *Florida*, 379 U.S. 184 (1964) 38, 39, 40

NAACP v. *Alabama*, 357 U.S. 449 (1958) 28
NAACP v. *Button*, 371 U.S. 415 (1963) 16, 26, 28, 30

Rapid Transit Corp. v. *City of New York*, 303 U.S. 573 (1968) 38
Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 36, 41
Rucker v. *Superior Court*, 104 Cal. App. 506 (1930) 37

Shapiro v. *Thompson*, —— U.S. ——, 37 U.S.L.W. 4334 (1969) 38
Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 24, 29
Smith v. *Bennett*, 365 U.S. 708 (1961) 14, 18, 19, 43
Spaulding v. *Bainbridge*, 12 R.I. 244 (1879) 34
United Mine Workers v. *Illinois Bar Ass'n*, 389 U.S. 217 (1967) 27, 28, 30

Williams v. *Shaffer*, 385 U.S. 1037 (1967) 20, 50
Willis v. *Willis*, 20 Pa. Dist. 720 (1911) 34

English

Brunt v. *Wardle*, 133 Eng. Rep. R. 1254 (1841) 32

Page

CONSTITUTIONAL PROVISIONS:

First Amendment 2
Fourteenth Amendment 3

STATUTES:

Federal

28 U.S.C. § 1253 2
1343 2
2201 2
2202 2
2281 2
42 U.S.C. § 1981 2
1983 2
1988 2

State

Cal. Stats. 1850, c. 95, p. 219 36
Cal. Pol. Code § 4468 (now § 22.2, Civil Code) 36
Conn. Gen. Stat. § 52-259 ..... 3, 8

English

Magna Charta, c. 40 32
6 Edward I, c. 1 (1278) 31
11 Henry VII, c. 12 (1495) 31
23 Henry VIII, c. 15 (1531) 32, 35

OTHER AUTHORITIES:

American Bar Foundation, *Public Provision for Costs and Expenses of Civil Litigation* (1966) 8, 34, 44
American Bar Foundation, *Final Report: Eligibility for Free Legal Services* (1966) 10
Bernard, *Remarriage, A Study of Marriage* (1956) 48
Burchinal, *Characteristics of Adolescents*, J. of Marriage and Family, p. 44 (Feb. 1964) 47

Page

Cavan, *The American Family* (1963) 46, 47
Corwin, *The Constitution of the United States of America, Analysis and Interpretation* (1952) 28
Developments in the Law: Equal Protection, 82 Harv. L. Rev. 1065 (1969) 40, 41
Discrimination Against the Poor and the Fourteenth Amendment, 81 Harv. L. Rev. 435 (1967) 22, 43, 45
Ferman, Kornbluh & Haber, *Poverty in America* (1965) 13
Goldberg, *Equality and Government Action*, 39 N.Y.U. L. Rev. 205 (1964) 13
Goode, *After Divorce* (1956) 46, 48
Grinnel, *Have Massachusetts Courts Inherent Common Law Power to Permit Suits In Forma Pauperis?* 4 Mass. L.Q. 323 (1919) 32-33
Harper and Skulnick, *Problems of the Family* (1962) 48
Jacobson, *American Marriage and Divorce* (1959) 48
Landis, *A Comparison of Children from Divorced and Non-Divorced Unhappy Marriages*, Family Life Coordinator (July, 1962) 61 47
Litigation Costs: The Hidden Barrier to the Indigent, 56 Geo. L.J. 516 (1968) 23
Locke, *Predicting Marital Adjustment by Comparing A Divorced and A Happily Married Group*, 12 Amer. Soc. Rev. 187 (1947) 49
Locke and Klausner, *Marital Adjustment of Divorced Persons*, 33 Soc. and Soc. Research 97 (1948) 49
Lutz, *Marital Incompatibility, Social Work and Social Problems* (1964) 46

Page

Lystad, *Family Patterns, Achievements and Aspirations of Urban Negroes,* 45 Soc. and Soc. Res. 281 (1961) 48
Maguire, *Poverty and Civil Litigation,* 36 Harv. L. Rev. 361 (1923) 31, 33
Mercer, *Interrelations Among Family Stability, Family Composition, Residence and Race,* 29 J. Marr. and Family 456 (1967) 46
Monahan, *When Couples Part,* 27 Am. Soc. Rev. 625 (1962) 49
Moynihan, *The Negro Family: The Case for National Action* (1965) 48
Nye, *Child Adjustment in Broken and in Unhappy, Unbroken Homes,* 19 Marr. and Family Living 356 (1957) 47
Parker and Kleiner, *Characteristics of Negro Mothers,* 28 J. Marriage and Family 507 (1966) 48-49
Plant, *The Psychiatrist Views Children of Divorced Parents,* 10 Law and Contemp. Prob. 807 (1944) 48
Pollock and Maitland, *History of English Law* (1895) 31
Qua, *Griffin v. Illinois,* 25 U. Chi. L. Rev. 143 (1957) 22
Rephart, *The Family, Society and the Individual* (1966) 47, 48
Right to Civil Counsel, 66 Col. L. Rev. 1323 (1966) 23, 45
Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases,* 2 Valp. L. Rev. 21 (1967) 32, 34
Smith, *Justice and the Poor* (1919) 30, 31, 32, 34
Sokol, *Handbook of Federal Habeas Corpus,* § 27 9
Steinzor, *When Parents Divorce* (1963) 49

Page

Stephenson, *Conn. Civil Procedure* 8
Suits In Forma Pauperis, 6 Cal. L. Rev. 226 (1918) 32
The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545 (1967) 23, 45
Tussman and tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949) 15, 41
Weeks, *Differential Divorce Rates by Occupation*, 21 Social Forces 334 (1943) 46
Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 Geo. L.J. 253 (1968) 22
Wright, *The Connecticut Law of Torts* (1956) 43

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 265

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,

Appellants,

vs.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLANTS

Opinion Below

The opinion of the United States District Court for the District of Connecticut is reported as *Boddie* v. *State of Connecticut*, 286 F. Supp. 968 (D. Conn. 1968).

Jurisdiction of This Court

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1253, which authorizes a direct appeal from a judgment by a three judge district court denying an injunction. The Court below consisted of three judges, convened pursuant to 28 U.S.C. § 2281 et seq., which refused to grant an injunction against Appellees. By their complaint, Appellants sought to enjoin Appellees from enforcing a Connecticut statute on the ground that such enforcement violated the equal protection and due process guarantees of the Fourteenth Amendment to the United States Constitution. The District Court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 1343(c), 2201, 2202 and 42 U.S.C. §§ 1981, 1983 and 1988.

The District Court judgment was entered on July 17, 1968. Appellants' Notice of Appeal was filed September 11, 1968. The case was docketed in this Supreme Court at Misc. 1131 on November 12, 1968, at which time a Jurisdictional Statement was filed. Probable jurisdiction was noted on June 23, 1969, at which time permission was given to proceed *in forma pauperis*.

Provisions of the United States Constitution

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statute Involved

The state statute, the constitutionality of which is challenged, is Conn. Gen. Stat. § 52-259, as modified by Public Act 628 of the 1967 Legislature, providing in pertinent part that:

> There shall be paid to the clerks of the supreme court of errors or the superior court, for entering each civil case, twenty-two dollars. . . . and, for recording each judgment, the following amounts: . . . (4) divorce judgments, whether for the plaintiff or the defendant, not including judgments annulling a marriage, fifty dollars, to be charged in all cases against the plaintiff except when the defendant prevails on a cross-complaint, in which case the fee shall be charged against the defendant. . . .

Public Act 628 provides, in part, that:

> There shall be paid to the clerks of the supreme court or the superior court, for entering each civil cause, forty-five dollars . . . .

Question Presented

Did the State of Connecticut, by requiring these indigent Appellants to pay filing fees and service of process as a condition precedent to initiating divorce suits and thereby preventing them from bringing such suits, violate their rights to petition for redress of grievances, due process and equal protection of the laws?

Statement of the Case

Gladys Boddie and seven other Appellants seek to divorce their husbands.* But filing an action in Connecticut costs forty-five dollars and service of process by sheriff increases the expense to approximately sixty dollars. Newspaper publication, where necessary, may increase the total expense to over one hundred dollars.

The Appellants cannot afford to pay these expenses. They submitted financial affidavits in support of their applications to the Superior Court for New Haven, Connecticut. Those affidavits were attached to the complaint in the instant proceeding in the Court below. In summary (see A. 11-28):

1. each Appellant is a welfare recipient, but receives no welfare assistance for legal expenses;
2. the incomes of the Appellants range from $66.00 to $370.86 per month;

* The decision below was based on Appellees' motion to dismiss. No evidence was taken. This Statement, therefore, is based on Appellants' Complaint, the allegations of which were accepted as true on the Motion To Dismiss. See Opinion below at 286 F. Supp. 972. Appellants' Complaint appears at A. 8-10.

3. the maximum number of dependents supported by each Appellant is six, in addition to herself;

4. the personal assets of Appellants range from $100 to $600 in estimated value; and

5. none of the Appellants has any assets from which to pay legal expenses.

If Appellants are required to pay the legal expenses of a divorce, they will be effectively barred from the Courts of Connecticut (A. 42).

On March 13, 1968, Appellants filed an application, accompanied by financial affidavits and appropriate divorce papers, asking the Superior Court for New Haven County to waive filing fees and effect service of process. On March 14, the clerk returned all the papers, declining to file them without payment of fees. On April 2, 1968, Superior Court Judge Joseph S. Longo, sitting on the Family Relations session, declined to hear the motion to waive costs and effect service of process, on the ground that he had no statutory authority to grant the relief sought. The Court Administrator for Connecticut, Supreme Court Justice John P. Cotter, took the same position on the same date.

This effectively precluded state relief. A civil rights action was then brought in the United States District Court for the District of Connecticut. Appellants sought both declaratory and injunctive relief, claiming that Connecticut had violated Appellants' constitutional rights by barring them from its courts solely on the basis of poverty. The prayer for relief asked the District Court to order Appellees to accept the divorce papers without payment of

filing fees and to effect service of process. Appellees moved to dismiss.

A three judge court granted Appellees' motion on July 17, 1968 and this appeal was taken.

Summary of Argument

Court costs for a divorce in Connecticut usually total about sixty dollars, but may be much higher. Appellants are all receiving welfare assistance, which does not provide for legal expenses, and they cannot pay for the divorce they seek. Consequently, they have been barred from the courts of Connecticut.

The State has thus denied equal protection of the laws. It is extending benefits to those who can pay court costs, but withholding these benefits from the poor. Clearly such an approach could not be applied to a person appealing from a criminal conviction or seeking to vote. Yet equally important rights, involving fundamental aspects of marriage and family, have been denied Appellants because of their poverty.

The State has also denied due process of laws. The Fourteenth Amendment, in guaranteeing due process to all, incorporates the right to petition for redress of grievances. This right has been rendered a nullity by Connecticut's discrimination against Appellants. Although others are free to petition for divorce, Appellants are barred solely on economic grounds.

There can be no justification for this violation of fundamental constitutional principles. By barring only the poor from its courts, Connecticut does not preclude frivolous

litigation. Or, if it does, at the same time it is permitting such litigation by the wealthy. Nor are Court fees and expenses a major source of economic support for the state courts, which are primarily supported by general taxation. In any event, requiring fees of the poor, who cannot pay them, is hardly calculated to generate revenue.

Finally, the fee requirement is not designed to discourage divorce or protect the family unit. The fee requirement applies to all litigation, regardless of its subject matter. And there is substantial evidence that withholding divorces may be more destructive of the family unit in many instances than the granting of divorce.

Plaintiffs should be allowed to pursue their divorce actions without payment of fees or service expenses. To imprison them in ruined marriage, to bar them from seeking new marriages, to make illegal any future procreation on their part simply because they are poor, would be a gross denial of the equal protection and due process of laws guaranteed by the United States Constitution. The poor are not second class citizens.

ARGUMENT

I.

The Court Costs of a Divorce Proceeding in Connecticut Are a Substantial Barrier to Litigation.

Connecticut divorce proceedings are initiated by writ, summons and complaint. The initial pleading must be served by a sheriff and then "returned" to (i.e., filed in) court. If personal or abode service is impossible, service by publication is necessary. See generally Stephenson, *Connecticut Civil Procedure,* with particular reference to §§ 174 et seq.

The sheriff's service fee varies, depending upon the difficulty of locating the defendant. Experience indicates that service usually costs a minimum of ten to fifteen dollars. Publication, of course, is more expensive, rising as high as one hundred dollars in Hartford and one hundred fifty dollars in New York City. See *Public Provision for Costs and Expenses of Civil Litigation,* American Bar Foundation (1966), p. 45.

The filing or "entry" fee in Superior Court is forty-five dollars, and is prescribed by statute. Conn. Gen. Stat. § 52-259, as modified by P.A. 628 of the 1967 Legislature.

Thus, the normal cost for beginning a divorce action is a minimum of sixty dollars. That amount constitutes a substantial burden for people of limited income, people who might be characterized as "poor" or "indigent." For such people, the requirement of paying court fees may effectively bar them from the courts.

II.

These Indigent Appellants Are Barred From Connecticut Courts by Their Inability to Pay Court Costs.

It seems clear that these Appellants are indigent. The Connecticut Welfare Department has so determined in extending minimal assistance, which does not embrace legal fees. Both this Court and the District Court reached a similar conclusion by ordering that this proceeding may be *in forma pauperis*.

The meaning of "indigency" has been stated as follows in Sokol, *Handbook of Federal Habeas Corpus* § 27, p. 145:

> "The dictionary defines indigent as 'poor; needy; destitute; in poverty.' A more useful definition was given by the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice:
>
> > '. . . poverty must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means. A problem of poverty arises for the system of criminal justice when at any stage of the proceedings lack of means in the accused substantially inhibits or prevents the proper assertion of a right or a claim of right.' "

This definition would appear to be a very sensible one. This Supreme Court stated in *Adkins* v. *DuPont*, 335 U.S. 331, 339 (1948) that:

> "We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. We think an affidavit is sufficient which states

> that one cannot because of his poverty 'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life.' To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges."

The Court went on to say:

> "The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. Nor does the result seem more desirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution."

These general principles are relevant here. But equally relevant is the definition to be found in the financial eligibility standards of the many legal services programs in this country. These programs must deal realistically with the dollars and cents meaning of indigency in a legal setting. They thus make concrete guidelines of abstract principles.

These guidelines are collected and discussed in *Final Report: Eligibility for Free Legal Services,* American Bar Foundation (August 1966). The following excerpts are of significance here:

"Examination of eligibility standards of about 200 civil legal aid organizations reveals very wide disparities in the standards from one organization to another . . . For a single person with no dependents, the figures range from a low of $75 a month in Edinburg, Texas, to a high of $325 in Bay Shore, Long Island, N.Y. For a married couple with no children the range is from $87 a month in Memphis to $350 in Wheaton, Illinois. The increment allowed for the spouse varies greatly from one city to another, whether expressed as an absolute amount or as a percentage of the allowance for a single person. Further, most cities allow additional income if there are dependent children, while a few apparently do not." (at pp. 9-10)

• • • • •

". . . for legal aid organizations serving a population over 1,000,000, the range of net income allowed for a single person was from $29 a week in Atlanta to $60 in Jamaica, N.Y., with a median of $40. The Chicago test was $25 plus amount of rent paid if unemployed, or $34 plus rent if employed. The annual income allowed, as shown in Table 2, ranged from $1500 to $3100, with a median of $2090. This figure may be compared with the amount of $1540 annual income (based on 1962 prices) suggested by Mollie Orshansky as the property line for a person living alone. ('Counting the Poor: Another Look at the Poverty Profile,' *Social Security Bulletin*, Jan. 1965, reprinted in Ferman, Kornbluh & Haber, *Poverty in America* (1965).) In 1962, 45% of such 'unrelated individuals,' or 5 million persons, had incomes below $1500. (House

Committee on Education and Labor, *Poverty in the United States* 7 (1964).)

"The income tests for single persons in the second category of offices, those serving a population of 600,000 to 1,000,000, range from a low of less than $20 in Memphis to highs of $60 in Hartford and $75 in Bay Shore, N.Y. The median is $36, somewhat below the median of $40 for cities of over 1,000,000 population.

"In the third group, cities of 300,000 to 600,000, two of the nineteen offices have income tests of $25 a week or less, which is only $1250 a year. The median is $36 a week or $1885 a year.

"For the fourth group, with a population of 100,000 to 300,000, the figures are comparable to the third group. Again 6 out of 52 offices reported income tests of $25 or less, and the median was $35. For annual income 23 offices reported $1560 or less, the two lowest being $924 and $950. The median was $1800. A fifth group, cities of less than 100,000, included only nine offices. The range of maximum net income rules was extremely wide, from $21 to $58 a week for a single person, and from $41 to $77 for a couple with two children.

"These eligibility requirements may be compared with standard estimates of the minimum level of income currently required for decent subsistence. For a nonfarm family of four, a recent publication of the Social Security Administration has stated that a 'low-cost' budget would require $3955 a year at 1962 prices, and an 'economy plan' budget would require $3165. On the basis of these figures the House Committee on Educa-

tion and Labor concluded: 'Obviously it does not exaggerate the problem of poverty to regard $3000 as the boundary.' (Ibid.) Orshansky uses a figure of $3130." (at pp. 11-12)

The *Final Report* goes on to quote (at p. 12) as follows from Ferman, Kornbluh & Haber, *Poverty in America* 40-41 (1965):

"The privation of families whose income is below the government's poverty-line may be seen by comparing the economy plan budget with the City Workers' Family Budget (CWFB) calculated by the Bureau of Labor Statistics of the U. S. Department of Labor. The 'modest but adequate' BLS CWFB represents 'an estimate of the total cost of a representative list of goods and services considered necessary by four-person city families . . . to maintain a level of adequate living according to standards prevailing in large cities of the United States.' Based on costs of living in 20 large cities in 1959, the most recent estimates of the BLS found that expenditures for a city worker's family of four would range from $6,567 in Chicago to $5,370 in Houston. Since that time, consumer prices have risen over 7.3 per cent."

One final authority may be noted. Mr. Justice Goldberg noted that $3000 gross income was the level at which poverty was established for a family of four in 1964, some five years ago. At that time, some 10,000,000 Americans could then be characterized as poor. *Equality and Government* 39 N.Y.U.L. Rev. 205 (1964).

By the standards discussed above, Mrs. Boddie and her co-appellants are "poor"; they are "indigent." Requiring payment of legal fees effectively bars them from seeking legal relief from the Courts. And this is true even though the amounts involved are relatively small. Filing fees of twenty dollars, four dollars and one dollar and fifty cents have been held so burdensome as to deny equal protection of the laws: *Burns* v. *Ohio,* 360 U.S. 252 (1959), *Smith* v. *Bennett,* 365 U.S. 708 (1961), and *Harper* v. *Virginia State Bd. of Elections,* 383 U.S. 663 (1966). Clearly, the far more substantial expenses of a divorce proceedings pose a barrier of greater significance than these minimal amounts. And the Court below so found. (286 F. Supp. at 972)

Yet the State of Connecticut declines to waive the requirement that these fees be paid. By imposing this requirement, the State has denied equal protection and due process to these appellants.

III.

Appellants Were Denied Equal Protection of the Laws When They Were Denied Access to the Courts Solely Because of Their Poverty.

A. The Equal Protection Clause Forbids Economic Discrimination in the Extension of Significant Rights.

The Fourteenth Amendment to the United States Constitution requires the States to extend equal protection of the laws to all citizens. In an early and excellent discussion of the equal protection clause, Tussman and tenBroek, *The Equal Protection of the Laws,* 37 Cal. L. Rev. 341 (1949) wrote of the Fourteenth Amendment to the United States Constitution that:

> "We now know that the equal protection clause was designed to impose upon the states a positive duty to supply protection to all persons in the enjoyment of their natural and inalienable rights—especially life, liberty and property—and to do so equally. We also know that the equal protection clause, *the only clause of section one of the Fourteenth Amendment that added new language to the Constitution, was originally regarded as the most basic and sweeping of the three.* . . ." (Emphasis supplied.)

The equal protection clause has been applied to economic discrimination, and its effect has been to render "the mere state of being without funds (as) a neutral fact—constitutionally an irrelevance, like race, creed or color." *Edwards* v. *California,* 314 U.S. 160, 184 (1941). Thus, finan-

cial barriers may not be imposed so as to deny equal protection of fundamental rights, such as the right to vote. *Harper* v. *Virginia State Bd. of Elections* 383 U.S. 663 (1966). An equally significant right is that embodied in access to the courts—the right to petition for redress of grievances: *NAACP* v. *Button,* 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1 (1964). A state may not deny this latter right by imposing financial barriers which exclude indigent litigants. Yet that happened here.

Perhaps the most significant case in this area is *Griffin* v. *Illinois,* 351 U.S. 12 (1956). There, this Court held that a state must provdie an appeal transcript to an indigent prisoner. The opinion said in part (351 U.S. at 16-17):

> "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of the Magna Charta: 'To no one will we sell, to no one will we refuse, or delay, right or justice . . . No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land.'"

The Court then said (p. 19):

> "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

Mr. Justice Frankfurter, concurring, added the following (351 U.S. at 23-24):

> ". . . when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.
>
> "To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law. 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread.' (John Cournos, a Modern Plutarch, p. 27.)
>
> "The State is not free to produce such a squalid discrimination."

Griffin has been followed by a series of decisions which reaffirm and amplify its basic principles. In *Burns* v. *Ohio*, 360 U.S. 252 (1959), an indigent prisoner's appeal papers were returned by a court clerk for failure to pay filing fees. The Court treated this as a final judgment by the State Court and reversed, saying (p. 258):

> "There is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants. Indigents must, there-

fore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio.

"The State's action in this case in some ways is more final and disastrous from the defendant's point of view than was the *Griffin* situation. At least in *Griffin,* the defendant might have raised in the Supreme Court any claims that he had that were apparent on the bare record, though trial errors could not be raised. Here, the action of the State was completely barred the petitioner from obtaining any review at all in the Supreme Court of Ohio. The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law."

In a similar case, *Smith* v. *Bennett,* 365 U.S. 708 (1961), this Court held that a state could not bar an indigent prisoner from habeas corpus relief because of his inability to pay filing fees. Again, in *Lane* v. *Brown,* 372 U.S. 477 (1962), a state practice was held invalid because it denied an indigent prisoner the right to a transcript of a writ of error *coram nobis.* And in *Long* v. *District Court of Iowa,* 385 U.S. 192 (1966), it was held that a state must provide a transcript to an indigent prisoner in a habeas corpus proceeding.

The cases discussed above are apposite here. They cannot be distinguished on the basis that they relate only to criminal actions, and not to the civil proceedings proposed by plaintiffs. The equal protection clause, by its terms, does not make such a distinction. Rather, it embraces *all* laws. Further, the cases cited above do not deal with criminal procedure so much as with court procedure—filing fees,

transcripts, appeals, habeas corpus, coram nobis. Indeed, in some of these cases the states themselves argued that the proceedings were civil, yet the Supreme Court still applied the equal protection clause. See, e.g., *Smith* v. *Bennett* and *Long* v. *District Court of Iowa, supra.*

Perhaps another basis for distinguishing the *Griffin* line of cases is that there it was the State which erected the barriers to an individual liberty and that the subject matter, that of criminal misconduct, was peculiarly a matter of State interest. Yet the same characterizations apply to divorce. In *Jeffreys* v. *Jeffreys,* 296 N.Y.S. 2d 74 (Sup. Ct. for Kings County, 1968), the Court allowed a divorce suit without payment of costs. The *Griffin* decision, the Court said, was applicable because (p. 82):

> ". . . An action for divorce is fundamentally different from actions in contract or concerning real property. The latter may be brought or not brought; they may be settled out of court. But our State Constitution (Art. I, §9) mandates that divorces may be granted only by "due judicial proceedings." Furthermore, state statutes dictate who may marry; by whom the marriage may be performed; the obligations of the parties during marriage; the grounds for separation or divorce and the obligations of the parties after the termination of the marriage. For all purposes the State is very much a "partner" to a marriage and a "party" in a matrimonial action.

The court said further (p. 87):

> "Marriage is clearly marked with the public interest. In this State, a marriage cannot be dissolved except

> by "due judicial proceedings" (N.Y. Const. Art. I, § 9). We have erected by statute a money hurdle to such dissolution by requiring in many circumstances the service of a summons by publication. . . . This hurdle is an effective barrier to Mrs. Jeffreys' access to the courts. The loss of access to the courts in an action for divorce is a right of substantial magnitude when only through the courts may redress or relief be obtained. Such a right is, it seems to me, as basic as Griffin's right to appeal and Mrs. Harper's right to vote. It is manifestly discriminatory under *Griffin* standards to deprive Mrs. Jeffreys of that right while affording it to others with money.
>
> I hold that she has been denied the equal protection of the laws guaranteed to her by the State and Federal Constitutions.

An action for divorce is thus unlike most routine civil actions. It is one in which the State has a vital interest and plays a substantial role. The *Griffin* line of cases thus apply and costs should be waived for an indigent litigant.

The position urged here—that the equal protection clause applies in civil cases and requires equal access to the courts for poor and rich alike—was raised in *Williams* v. *Shaffer*, 385 U.S. 1037 (1967). There, the petitioner sought to contest an eviction proceeding. Georgia required posting of security which was beyond the tenant's means and the petitioner was evicted. The petition for certiorari was denied, apparently because of mootness. Mr. Justice Douglas was joined in dissent by Chief Justice Warren and Mr. Justice Brennan:

"The effect of the security statute is to grant an affluent tenant a hearing and to deny an indigent tenant a hearing. The ability to obtain a hearing is thus made to turn upon the tenant's wealth. On numerous occasions this Court has struck down financial limitations on the ability to obtain judicial review. See e.g., *Griffin* v. *Illinois,* 351 U.S. 12, 100 L ed 891, 76 S Ct 585; *Burns* v. *Ohio,* 360 U.S. 252, 3 L ed 2d 1209, 79 S Ct 1164; *Smith* v. *Bennett,* 365 U.S. 708, 6 L ed 2d 39, 81 S Ct 895. We have recognized that the promise of equal justice for all would be an empty phrase for the poor, if the ability to obtain judicial relief were made to turn on the length of a person's purse. It is true that these cases have dealt with criminal proceedings. But the Equal Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters. I can see no more justification for denying an indigent a hearing in an eviction proceeding solely because of his poverty than for denying an indigent the right to appeal (*Burns* v. *Ohio, supra*), the right to file a habeas corpus petition (*Smith* v. *Bennett, supra*), or the right to obtain a transcript necessary for appeal (*Griffin* v. *Illinois, supra*)."

The following comments are germane here, in discussing the relevance of the Griffin line of cases to this proceeding:

"The so-called "civil" problems of the poor may involve the defense of a landlord-tenant action for possession. Inability to defend this case for failure to post a bond or to obtain counsel will often result in an eviction

> from the premises—a result which in one sense is more of a deprivation of liberty than a suspended sentence, perhaps even more than incarceration. Imprisonment restrains the individual in his freedom of movement alone; eviction may condemn one to an indeterminate sentence of inadequate housing or no housing at all. This is not to say that the eviction process has no place in the law because of its harshness, any more than the criminal process should be condemned because it results in sending men to jail. But when the procedural fairness of the systems is in issue, it appears incongruous that the indigent tenant may be evicted without an opportunity for an impartial hearing, whereas the financial disabilities of the indigent criminal accused are studiously removed." Willging, *Financial Barriers and the Access of Indigent to the Courts,* 57 Geo. L.J. 253, 270 (Nov. 1968).

Applying the equal protection clause in civil cases to relieve financial barriers to the poor has been urged by many legal scholars. Shortly after the decision in *Griffin* v. *Illinois, supra,* Chief Justice Qua of the Massachusetts Supreme Court noted that *Griffin's* logic compelled waiving civil costs in suits brought by indigents, although he criticized such a result. 25 U. Chi. L. Rev. 143 (1957). In a comprehensive comment, *Discrimination Against the Poor and the Fourteenth Amendment,* 81 Harv. L. Rev. 435 (1967), the following conclusion appears (p. 450-451):

> "Poverty often interferes with the ability of the poor to exercise their legal rights in civil litigation. Court fees or bond requirements can block or limit access to court. Once inside a court the indigent may often be

unable to litigate effectively because he lacks counsel. When judicial remedies are feasible, the courts should intervene to remove these disabilities of property."

Two recent comments go beyond merely urging removal of fee requirements and argue for appointment of counsel in civil cases: *Right to Civil Counsel,* 66 Col. L. Rev. 1323 (1966) and *The Indigent's Right to Counsel in Civil Cases,* 76 Yale L.J. 545 (1967). In the latter, the following observation appears (p. 550):

"The state cannot and need not equalize the impact on rich and poor of all its actions and institutions. But because the establishment of a forum for enforcing claims and vindicating legal rights is so fundamental, the state cannot close that system to any person because of his relative poverty.

"Equal justice, unlike equal privileges on the municipal golf course, is a defining condition of citizenship. The Court has recently recognized that a $1.50 poll tax treats those who cannot pay as second class citizens. A $50 or $100 cover charge at the courthouse bears the same message."

See also: *Litigation Costs: The Hidden Barrier to the Indigent,* 56 Georgetown L.J. 516 (1968).

The simple, elemental fact is that for many of the poor there is now no access to the courts. Financial barriers bar the way. Yet our heritage is that of equal justice, equal protection of the laws, equal access to the courts. The State of Connecticut has denied such equality to these Appellants.

B. The Rights of Divorce, Remarriage and Procreation, All Involved Here, Are Sufficiently Significant to Come Within the Ambit of the Equal Protection Clause.

It is true, of course, that the *Griffin* line of cases involved the personal liberty of men in custody. The appellants here, by contrast, are free. Nevertheless, their liberty is at stake; bondage can exist beyond jail walls, and one of the most oppressive forms is that facing these women. They are bound to marriages in ruins, bound to husbands who have left them, who no longer love or support them, husbands who—it is alleged—have been guilty of intolerable cruelty.

Until this bondage is severed, these Appellants are forbidden by law to pursue happiness with other men or bear other children. Yet these rights of remarriage and procreation, denied here solely because Appellants cannot pay the legal costs of divorce proceedings, are substantial, fundamental rights. This was recognized in *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), where the Court said (p. 541):

> "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race . . . [S]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of equal protection of the laws is a pledge of the protection of equal laws."

And in *Loving* v. *Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010 (1967), it was held that the freedom to marry is so fundamental as to be guaranteed by due process of law (p. 1018):

> "These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. *Skinner* v. *Oklahoma*, 316 U.S. 535, 541, 86 L. Ed. 1655, 1660, 62 S. Ct. 1110 (1942). See also *Maynard* v. *Hill*, 125 U.S. 190, 31 L. Ed. 654, 8 S. Ct. 723 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classification embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State."

See also *Levy* v. *Louisiana*, 391 U.S. 68, 71 (1968) and *Griswold* v. *Connecticut*, 381 U.S. 479, 495 (1965).

The critical nature of the rights involved here was ignored by the Court below. 286 F. Sup. 973. In this, it erred. The *Griffin* line of cases certainly differs from the instant proceeding. But in one vital respect they are simi-

lar: fundamental rights were denied because of poverty. The Court below missed this essential point.

If the freedom to marry in the first instance cannot be made subject to irrelevant factors, such as race, then the equally important right to remarry cannot be made subject to equally irrelevant factors, such as poverty. A state might perhaps deny to all its citizens the right to remarry. Or it might deny any right to divorce. But it may not extend these rights to some citizens while denying them to others whose sole disqualification is their poverty.

IV.

Appellants Were Denied Due Process of Laws When They Were Denied the Opportunity to Petition for Redress of Grievances.

A. The Right to Petition for Redress of Grievances is an Element of Due Process.

The Fourteenth Amendment to the United States Constitution guarantees that no state shall deny due process of law. The First Amendment to that Constitution protects the right of citizens "to petition the Government for a redress of grievances." The right so to petition is incorporated into the due process clause, and is applied thereby to the States, at least where the petitioning is embodied in litigation affecting liberties of assembly, speech and political expression. *NAACP* v. *Button*, 371 U.S. 415 (1963). But even where political expression is not involved, the right to seek redress in the courts is nevertheless a matter of federal due process. In *Brotherhood af Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964)

and *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217, 19 L. Ed. 2d 426 (1967), attorneys had been retained to render group legal services. Such practices were prohibited by state statute. Although the legal advice and issues were routine and not of constitutional magnitude, this Court held that the due process clause protected such arrangements, since they involved the right to petition the courts for redress.

In the *Mine Workers* case, this Court said (p. 430):

> "We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press. 'All these, though not identical, are inseparable.' *Thomas* v. *Collins*, 323 U.S. 516, 530, 89 L. Ed. 430, 440, 65 S. Ct. 315 (1945). See *DeJonge* v. *Oregon*, 299 U.S. 353, 364, 81 L. Ed. 278, 283, 57 S. Ct. 255 (1937). The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil."

This Court has long recognized that:

> "The right to sue and defend in the Courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. *It is one of the highest and most essential privileges of citizenship . . .*"
>
> *Chambers* v. *Balt. & Ohio R.R.*, 207 U.S. 142, 148 (1907). (Emphasis supplied.)

These cases are apposite here. The only possible distinction is that they involved groups, whereas this case involves individuals. But the Constitution, by its terms, is not limited to groups. It is equally concerned, perhaps primarily concerned, with individual liberties. The groups in the *Button, Railroad Trainmen* and *Mineworkers* cases had only derivative standing; they were asserting the rights of their individual members to petition for redress. It would be strange indeed to protect the right of a powerful group yet deny such protection to a powerless individual.

True it is that these cases involved the groups' rights to assembly. But this was for the purpose of advancing the members' rights to petition for redress, see, e.g., *NAACP* v. *Alabama*, 357 U.S. 449, 459 (1958), and it was that latter right which was primary. As Professor Corwin has written, *The Constitution of the United States of America, Analysis and Interpretation (1952)*, p. 306:

> "Historically, therefore, the right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if Amendment I read; 'the right of the people peaceably to assemble' *in order to* 'petition the government.'"

In any event, the present case involves rights as basic as the right to assembly: the rights to marry and procreate, and the right to personal liberty, free from bondage to a meaningless marriage. See, *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942) and *Loving* v. *Virginia,* 388 U.S. 1, 18 L. Ed. 2d 1010 (1967).

Appellants reliance on the due process clause may superficially resemble the earlier argument based upon the equal protection clause. But there is a critical distinction. Any argument based upon the equal protection clause must demonstrate that the State is treating its citizens unequally in a significant manner. The present argument, based upon the due process clause, is not so conditioned, because the right to petition for redress of grievances is not only a constitutional right but also a basic mode of political expression. Any infringement of such a right must be considered significant.

Appellants do not contend they have a right to a divorce in the sense that they may have a right to vote or to personal liberty. What they do maintain is that they have a federally protected right to petition the courts for redress of grievances. And denial of that right denies a second federally protected right: due process of the laws.

Appellants maintain further that denial of these rights is of serious consequence. They seek by court action to restructure the marital basis of their lives and the lives of their families. Nothing could be more basic or fundamental. *Loving* v. *Virginia,* 388 U.S. 1 (1967); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942). They can achieve this only by access to the courts. Thus, the right to petition the courts is surely as basic as the right to vote or to enjoy personal liberty.

This argument was totally ignored by the District Court. Nowhere in the Opinion below is the right to petition for redress of grievances mentioned. There is no discussion of the *Button or Mineworkers* cases. Yet this issue was briefed and argued before the lower Court. And it is of manifestly fundamental importance to this case. Appellants repeat here the language quoted above from *Chambers* v. *Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907) that "The right to sue and defend . . . is one of the highest and essential privileges of citizenship."

The decision below denies these privileges to Appellants.

B. The Right of a Poor Person to Petition for Redress of Grievances Without Payment of Court Costs Is Deeply Rooted in the Common Law Which Preceded The United States Constitution's Guarantee of Due Process.

The problem of the poor gaining access to the courts is inextricably interwoven with the question of costs.

> "Costs have existed so long that there is a general disposition to regard them as fundamental, as immutably bound up with our legal institutions. This is a mistake; costs are not established by our constitutions, they are not the product of common law, they exist solely and entirely as creatures of statute." Reginald Heber Smith, *Justice and the Poor,* 20 (1919).

"The early English law had no system of costs. . . ." *Id.* Parties whose claims or defenses turned out to be false were fined, but generally the only costs were those imposed in the discretion of the judge in awarding damages. True,

the early kings could charge for writs, but ". . . it was an accepted maxim that the poor should have their writs for nothing." Smith at 21; Pollock and Maitland, I *History of English Law* 174 (1895).

A cost system was first created by the Statute of Gloucester (6 Edward I, c. 1) (1278). Smith at 21; Maguire, "Poverty and Civil Litigation," 36 Harv. L. Rev. 361, 366 (1923) (hereinafter cited as Maguire). One motivating factor was the need for revenue. Equally important, a cost system carried over the notion that a party who raised a false claim or defense should be fined and that the wrongdoer must pay the costs. Finally, it was thought that a system of costs would serve to deter litigation. Smith at 21.

Poor persons were expressly permitted to litigate without payment of costs by the statute of 11 Henry VII, c. 12 (1495). It provided in part that:

> ". . . (E)very pouer persone or persones which have & hereafter shall have cause of accion or accions ayenst any persone or persones within the realme shall have, by the discrecion of the Chaunceller of this realme, for the tyme being writte or writtes originall and writtes of Sub pena according to the nature of their causes, therefor nothing paieng to youre Highnes for the seales of the same, nor to any persone for the making of the same writte & writtes to be hereafter sued. . . ." Maguire at 373.

The "forma pauperis" procedure, as it is called, is widely believed to have originated in this statute. See for example, Smith at 21. But it appears that 11 Henry merely set forth the procedure as it was then recognized by the

common-law courts. *Brunt* v. *Wardle,* 133 Eng. Rep. R. 1254 (1841), as cited in Comment, *Suits in Forma Pauperis,* 6 Cal. L. Rev. 226 (1918). Chief Justice Tindal and Justice Maule there refer to a case decided some "twenty years before the statute of Henry VII, where a common-law court was using this power (to permit poor persons to sue without payment of costs)." Comment, 6 Cal. L. Rev. at 226. In that case:

> "... one John Brown was present to be the presignator of the poor in the Common Pleas * * * and it was said that if any poor man would swear to him that he was not able to pay for the entry of pleas * * * then he ought to enter the pleas without taking anything for his labor * * * and this was done by the advise of the justices." Y.B. 15 Edw. IV, 26b, as quoted by Maguire at 366.

In any event, the statute of 11 Henry VII and court practice prior to its enactment "... (gave) effect to the spirit of Magna Charta. . . .," Smith at 21-22, which proclaimed: "To no one will we deny, or delay right or justice." Magna Charta, c. 40, as quoted in Silverstein, "Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases," 2 Valp. L. Rev. 21 (1967) (hereinafter cited as Silverstein).

This process of safeguarding the rights of the poor "was carried to its logical completion" by the enactment of 23 Henry VIII, c. 15 (1531), which relieved a poor person who sued and "failed to obtain a verdict or was nonsuited" of the burden of paying costs. Smith at 22; Grinnell, "Have Massachusetts Courts Inherent Common Law

Power to Permit Suits in Forma Pauperis?", 4 Mass. L.Q. 323, 325 (1919).

There remained, however, a fear of vexatious and frivolous suits. Thus, the defeated poor suitor was "subjected to such punishment as the judges deemed reasonable." *Id.*

> ". . . (I)f a pauper abused the proceeding or was nonsuited, he might be taken to the market-place and whipped; but the general spirit of the law was such that when a motion came before Lord Chief Justice Holt to order a nonsuited pauper to be whipped, he denied the motion, observing that there was no officer for the purpose and that he had never known it done." Grinnell at 325-326.

This was the letter and spirit of the law. In actual practice, however, the common-law procedure was severely limited. The statute of 11 Henry VII applied only to plaintiffs and only in the common-law courts. If a man had more than five pounds sterling in hand, he was generally not sufficiently poor. Maguire at 376. For a time court rule required the poor suitor to obtain a lawyer's certificate that he had a good cause of action. Finally, the forma pauperis proceedings were not in fact free.

Individuals seeking to proceed in forma pauperis had to pay "minimum preliminary fees" of six shillings and sixpense. And if he ". . . were admitted and won a verdict of more than five pounds he would have to pay something like four pounds more before receiving a penny on his recovery. . . ." Fees were, in effect, merely deferred for a plaintiff who prevailed. Maguire at 377.

> "The American states carried over into their judicial systems the plan of costs and fees, but many neglected to include the necessary corollary of the proceeding in forma pauperis." Smith, *Justice and the Poor,* at 22.

A substantial number of states did adopt or provide a forma pauperis procedure by statute. See Silverstein at 29-30; and American Bar Foundation, *Public Provision for Costs and Expenses of Civil Litigation,* at 17 (1966).

While the weight of authority appears to be that absent statutory provisions, poor persons may not sue in forma pauperis, see e.g., *Campbell* v. *Chicago & Northwestern Ry.,* 23 Wis. 490 (1868), courts in at least five states (North Carolina, Rhode Island, Texas, Pennsylvania and California) have recognized that a poor person has a right independent of any enabling legislation to so proceed. The decisions reveal two basic approaches: one constitutional, the other historical. On one hand, constitutional provisions have been construed to exempt the poor from costs and fees. *Spaulding* v. *Bainbridge,* 12 R.I. 244 (1879); *Jack* v. *Admrs. of McClure,* 26 Pa. County Ct. 59 (1901); *Willis* v. *Willis,* 20 Pa. Dist. 720 (1911); and *Cunha* v. *Cunha,* 44 D. & C.2d 230 (Pa. 1968). On the other hand, courts have held that the forma pauperis procedure was inherited as part of the common law of the state. *M'Clenahan* v. *Thomas,* 6 N.C. (Murph.) 247, 278 (1813); *Martin* v. *Superior Court,* 176 Cal. 289, 168 Pac. 135 (1917); see also *Hickey* v. *Rhine,* 16 Tex. 577 (1856).

With respect to this latter rationale, the courts have stated either that the English statutes of 11 and 23 Henry are a part of the common law of the state or that the courts at common law had the inherent power to admit poor per-

sons to sue in forma pauperis and that this power was handed down to those state courts which exercise common law jurisdiction.

The "statutory origin" theory is exemplified by the case of *M'Clenahan* v. *Thomas,* 6 N.C. (Murph.) 247 (1813), wherein the court held that the statute of 23 Henry VIII, c. 15 (excusing defeated poor suitors from payment of costs) had been adopted by North Carolina as a part of the common law. *Hickey* v. *Rhine,* a Texas case, is said to illustrate the "inherent power" theory. There the court announced that it had the inherent power to permit:

> ". . . the case to proceed on a satisfactory showing of the inability of the plaintiff to give the security, as no man should be prevented from prosecuting a suit, seeking redress for an outrage upon his person, on the ground of his poverty." 16 Tex. 577, 78-79 (1856).

The inherent power language, however, is dictum, since a contemporaneous Texas statute expressly delineated a forma pauperis procedure applicable to the facts of the case. *Hickey* at 578.

The leading case encompassing both these theories, is *Martin* v. *Superior Court,* 176 Cal. 289, 168 Pac. 135 (1917) (see also *Majors* v. *Superior Court,* 181 Cal. 270, 184 Pac. 18 (1919), a sequel to *Martin*), the first of a line of California cases. There, a day-laborer with a wife and ten children was permitted to bring an action in forma pauperis to recover damages for the wrongful death of his minor daughter.

The court noted that by California statute the common law of England had been adopted ". . . so far as it is not

repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of (California)." Cal. Stats. 1850, c. 95, p. 219; Cal. Pol. Code § 4468 (now Sec. 22.2, Cal. Civil Code). It then proceeded to hold that the term "common law" embraces the English statutes in force at the time the Code section was adopted and which modified the common law, including the statute of 11 Henry VII. *Martin,* 168 Pac. at 136. The court did not stop there, but went on to declare:

> ". . . the power of the English common-law courts to remit fees on petition in forma pauperis did not have its origin in any statute, but was in fact exercised as one of the inherent powers of the courts themselves, quite independently of statute. And this one would naturally expect to find since, imperfect as was the ancient common-law system, harsh as it was in many of its methods and measures, it would strike one with surprise to be credibly informed that the common-law courts of England shut their doors upon all poor suitors who could not pay fees, until Parliament came to their relief. Even greater would be the reproach to the system of jurisprudence of the state of California if it could be truly declared that in this twentieth century, by its Codes and statutes, it had said the same thing. . . . " *Martin,* 168 Pac. at 137.

Since this landmark opinion, the power of the California courts to permit proceedings in forma pauperis has, it appears, been exercised on numerous occasions. Despite language in some of the early cases suggesting a narrow and frugal application of forma pauperis, the California courts have treated the forma pauperis procedure as re-

medial in nature, extending it far beyond its limited common-law scope. Thus, for example, in *Rucker* v. *Superior Court,* 104 Cal. App. 506, 286 Pac. 732 (1930), a defendant was permitted to appeal in forma pauperis. In *Isrin* v. *Superior Court,* 45 Cal. Rptr. 320, 403 P.2d 728 (1965), an earlier ruling, that denied an indigent the right to proceed in forma pauperis where he was represented under a contingent fee contract, on the ground that the attorney had an interest in the litigation and should, therefore, advance the costs, was overturned. And *County of Sutter* v. *Superior Court,* 53 Cal. Rptr. 424 (Dist. Ct. App., 1966), recognizes, as did the United States Supreme Court before it, that the forma pauperis principles applies not just to one who is utterly without funds, but to one who "cannot because of his poverty 'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life.'" *Adkins* v. *Dupont Co.,* 335 U.S. 331, 339 (1948).

The English common law and American case law are not, of course, uniformly favorable to Appellants' position. Nevertheless there is a substantial body of authority reaching back centuries to the effect that our system of justice must, as a matter of due process, open its doors to the rich and the poor alike. That body of authority is reflected in the Fourteenth Amendment's guarantee of due process and, for that reason, has been reviewed here.

V.

Connecticut's Requirement That These Indigent Appellants Pay Court Costs Which They Cannot Afford Is Not a Permissible Exercise of the Police Power.

A. A Classification Based Upon Economic Discrimination is Disfavored and Must be Both Necessary and Reasonably Related to the Objectives Sought.

A state may make distinctions among its citizens. At a minimum, however, any classification must be rationally related to the attainment of a legitimate objective of government action. See, e.g., *Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573, 578 (1968). More importantly, where the state's classification is based on certain suspect criteria or affects rights deemed particularly important mere rational relationship between the classification and the end sought will not justify the discrimination. A showing that the classification is *necessary* to promote a compelling governmental interest is then required. *Shapiro* v. *Thompson*, —— U.S. ——, 37 U.S.L.W. 4334, 4338 (1969). The economic discrimination effected by the statute in question fails either test.

This Court has placed discrimination among citizens on the basis of wealth in the same "traditionally disfavored" category as discrimination on the basis of race or color. *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 669 (1966). State laws involving racial discrimination have been held to be " 'constitutionally suspect' . . . and subject to the 'most rigid scrutiny' . . . and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose. . . ." *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964).

A law which discriminates on the basis of poverty should be equally disfavored. Like a racial classification,

> "Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, . . . *and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.*" *McLaughlin* v. *Florida*, *supra* at 196. (Emphasis supplied.)

Treating discrimination against poor citizens the same as discrimination against black citizens is in keeping with the highest purposes of the equal protection clause, as stated in *Hernandez* v. *Texas*, 347 U.S. 475 (1954):

> "Through our history differences in races and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

This Court has said:

> "And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, *Harper* v. *Virginia Board of Elections*, *supra*, two factors which would independently render

> a classification highly suspect and thereby demand more exacting judicial scrutiny." *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802 (1969), 22 L. Ed. 2d at 744.

The effect, in constitutional terms, of a holding that a classification is based on a suspect criterion, like wealth, or affects a fundamental citizen interest, like access to the courts, is invalidation of the statutory classification, unless its *necessity* to achieve a *compelling* governmental interest is clear. *Developments in the Law: Equal Protection,* 82 Harv. L. Rev. 1065, 1101, 1121 (March 1969). The statute involved here may have several purposes: raising revenue, discouraging frivolous litigation, protecting the family unit from divorce. Its purpose may be all of these or none. The Appellants here do not question the ligitimacy of such objectives.

But the state must show that its interest is of such a magnitude as to preclude all law suits by those too poor to pay the necessary court and service expenses. It must show, too, that requiring these fees as a prerequisite to suit is *necessary* to achievement of the State's purposes. If no such showing is made, Connecticut may not bar the poor from its courts.

This approach, similar to the concept of overbreadth employed in First Amendment cases, is traditional when this Court views classifications drawn on suspect lines or which impair some fundamental interest. See, e.g., *McLaughlin* v. *Florida, supra; Carrington* v. *Rash,* 380 U.S. 89 (1965).

> "Thus, the cases indicate that when a fundamental interest is impaired or a suspect distinction drawn,

the Court will demand a *convincing demonstration* that the classification is well tailored to achieve the statutory objective. . . . The State must show at least that this classification is *more than just one of several reasonable ways* of achieving its goals." *Developments in The Law: Equal Protection, supra* at 1122. (Emphasis supplied.)

Even applying the less stringent "rational relationship" test to the statute here may compel the conclusion that the statute must fall. One of the basic requisites for a valid classification is that it must include all and only those persons similarly situated with respect to the purpose of the law. See Tussman and tenBroek, *The Equal Protection of the Laws,* 37 Calif. L. Rev. 341, 346 (1949). An over-inclusive classification is not permitted by the equal protection clause.

> "[L]egislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'" *Rinaldi* v. *Yeager,* 384 U.S. 305, 309 (1966).

In *Rinaldi* this Court invalidated a New Jersey statute requiring incarcerated defendants to reimburse the state, out of their prison pay, for the cost of transcripts provided in connection with their unsuccessful appeals. Though collection from some Appellants defrayed the state's costs and, therefore, fulfilled the law's purpose, the *classification* of Appellants into those incarcerated and those fined or

on probation was not reasonable. Therefore, concluded the Court:

> "There is no defensible interest served by focusing on that distinction as a classifying feature in a reimbursement statute, since it bears no relationship whatever to the purpose of the repayment provision." *Ibid.*

Thus, the requirement of the court costs must meet two tests. The first is that the statute must be reasonably related to the objectives sought. Secondly, because the statute involves a disfavored mode of classification—that of wealth—it must be *necessary* to the ends intended. If there are other means of achieving those ends, the statute is void.

B. There Is No Necessity or Rational Basis for Barring Litigation by the Poor.

The requirement of filing fees denies due process and equal protection of the laws to plaintiffs. Yet, it may be argued, such a requirement is justified by necessity.

There is no substance to that argument.

Perhaps it will be contended that filing fees are necessary to discourage litigation. If so, the impact must surely fall exclusively on the poor. The wealthy would not be deterred by legal fees of under one hundred dollars. Thus, the result is to eliminate only the litigation of the poor, without regard to the merit of that litigation, while even the most frivolous suit may be filed by a wealthy person. Yet there is no rational basis for assuming that an indigent's suit will be less meritorious than that of a wealthy person. See *Griffin* v. *Illinois,* 351 U.S. 12, 17-18 (1956); *Burns* v. *Ohio,*

360 U.S. 252, 257-258 (1959); and *Smith* v. *Bennett,* 365 U.S. 708, 710 (1961).

If, indeed, the intent is to eliminate frivolous suits, there are other means of accomplishing that goal. The state might require—as Connecticut in fact does—that significant actions be initiated by a pleading signed by a Commissioner of the Superior Court or Clerk of court. Again, abuse of process could be made a tort, as it now is in Connecticut. See Wright, *The Connecticut Law of Torts,* 220-224 (1956). Or verifications under oath could be required in all actions, with contempt punishments for false statements. Any of these devices could be employed to eliminate frivolous litigation, without simultaneously excluding the poor from the courts.

It may well be that enabling the poor to sue without payment of fees will increase litigation. But this is only saying that acknowledging a right may lead to its exercise; hardly a surprising result. The potential impact is, of course, wholly speculative. Even if it is substantial, still, clearly substantial consequences did not deter the Court in *Gideon* v. *Wainwright, supra,* and there is no reason to adopt a different attitude here. A contrary approach would require a Court to weigh unmeasurable and imponderable financial and systemic variables in every case involving Constitutional issues. See *Discrimination Against the Poor and the Fourteenth Amendment,* 81 Harv. L. Rev. 435, 441 (1967). This would be an untenable approach to constitutional interpretation.

Of course, the argument may be that court fees are required to produce revenue. This may be doubted, since the revenue produced is only a small fraction of the cost of

the judicial system. Appellants have been advised* that the total appropriations for the Connecticut judicial department are approximately fifteen million dollars and that revenue from filing fees totalled about one-tenth of that, or one million five hundred thousand dollars. The District Court's finding, at 286 F. Supp. 973, that perhaps one-fifth of the cost of Connecticut's court system is produced by fees lacks foundation in the record. No evidence was offered as to this issue. In fact, the relevant statistic is not how much revenue is now generated by fees, but how many cases *might* be prosecuted without fees.

Further doubt is cast upon the necessity for court fees by the fact that some twenty-three jurisdictions and the federal courts provide for waiver of fees on behalf of indigents, thus foregoing potential revenue. See: *Public Provision for Costs and Expenses of Civil Litigation*, American Bar Foundation (1966), p. 11. This exhaustive study contrasts (at pp. 24-25) the court system of fees with the approach in administrative tribunals, where most costs of proceedings are borne by the government. The study notes (pp. 2-3) that:

> "Although fees charged to litigants do not produce nearly enough revenues to operate the federal and state courts, such fees and auxiliary charges are so high as to constitute a substantial deterrent to the poor litigant if he must pay these expenses himself."

---

* See Exhibit #1, attached to this Brief, containing a portion of a report by the Chief Administrator of the Connecticut Courts and a letter from the Executive Secretary of the Connecticut Judicial Department.

It is not here contended that all civil actions must be *in forma pauperis* where an indigent is involved. Rather, such an approach is required only in matters of fundamental import. Marital relationships may be thus characterized. So also, home and residence, child custody and livelihood are similarly basic. But matters of personal pique or gain are of lesser degree. While the distinction is not wholly clear, it is not unlike that involved in applying the principles of *Gideon* v. *Wainwright, supra,* to determine when criminal defendants are entitled to appointment of counsel. See: *Discrimination Against the Poor and the Fourteenth Amendment,* 81 Harv. L. Rev. 435, 450-451 (1967) and *The Indigent's Right to Counsel in a Civil Case,* 76 Yale L.J. 545, 558 (1967).

So also, the contentions here do not lead logically to an argument for appointment of counsel or provisions of experts in civil cases. Here, the Appellants are simply asking that Connecticut terminate an unlawful practice. There is no demand that the State develop a new system for affording new services. Appellants' position is that, once in court, there is an opportunity to be heard even without experts or counsel; but that without the relief sought here, there is no way even to get into court. See *Right to Civil Counsel,* 66 Col. L. Rev. 1323 (1966), and *Burns* v. *Ohio,* 360 U.S. 252, 258 (1959).

C. Barring Divorce Actions Has Destructive Consequences Upon the Family Units of the Poor.

It may be contended that the policy of requiring fees is designed to discourage divorce and save the family unit. Such an argument is strangely inconsistent with Connecti-

cut's public policy of allowing divorces. This argument also ignores the fact that the fee requirement applies to all litigation, not just divorce. (See the Opinion below, 286 F. Supp. 974, f. 6.) Too, it ignores the disastrous consequences of denying divorce to the poor. And yet those consequences are well documented.

The rate of divorce is lowest among the unskilled portions of our society. Goode, *After Divorce,* Free Press (Glencoe, 1956), pp. 46-47. This may be attributed in part to the expense of divorce proceedings. Weeks, *Differential Divorce Rates By Occupation* 21 Social Forces, at p. 334 (1943); W. A. Lutz, "Marital Incompatibility," in Cohen, *Social Work and Social Problems* (1964). Similarly, Negroes have a disproportionately high rate of desertion, rather than divorce, apparently due—in part—to the high expense of divorce proceedings. See, e.g., Goode, *After Divorce, supra,* at p. 51; Mercer, *Interrelations Among Family Stability, Family Composition, Residence and Race* 29 J. Marriage and the Family, 456-460 (1967); and Cavan, *The American Family* (3d Ed., Crowell Co. 1963), at pp. 431-432:

> "According to several studies, the unskilled have rates lower than the semi-skilled, a fact that may be accounted for by the expense of divorce, religious affiliation or lack of property that would necessitate a legal settlement. . . . Non whites, whose income tends to be much lower than that of whites, find it less troublesome and less expensive to separate than to divorce.

If the poor and Negroes are barred from divorce, then they are left only with a choice to separate or live together in unhappiness. The consequences of the latter are worse

than divorce, at least on the children. Nye, *Child Adjustment in Broken and In Unhappy, Unbroken Homes* 19 Marriage and Family Living, pp. 356-61 (1957); Landis, *A Comparison of Children from Divorced and Non-Divorced Unhappy Marriages,* Family Life Coordinator, pp. 61-5 (July, 1962). Studies indicate that children from broken homes are often better adjusted than those from unbroken yet unhappy homes. See Burchinal, *Characteristics of Adolescents,* J. of Marriage and Family, p. 44 (Feb. 1964).

Consequently, separation is frequently chosen where divorce is actually needed but economically unavailable.

Yet separation has a far more deleterious effect on the family than divorce. The result of separation may be a series of shifting, unstable desertions, reunions, and extra marital alliances, as noted by *Cavan, supra,* at p. 151:

> "The very fact that after a separation the marriage may be resumed without formality adds to the instability. One separation may follow another, often being in the nature of desertion by the father who moves out, leaving the mother and children without support. With longer periods of separation, but no legal termination of the marriage through divorce, temporary alliances or more permanent common-law marriages may replace legal marriage."

This is discussed at length in Rephart, *The Family, Society and The Individual,* pp. 596-7 (2d Ed., Houghton Mifflin, 1966). The economic consequences of the wife and the emotional consequences on the children of desertion are severe, while those of divorce may be less deep and perma-

nent. See, e.g., Plant, *The Psychiatrist Views Children of Divorced Parents,* 10 Law and Contemporary Prob. 807 (1944). Particularly is this so since divorce offers the prospect—and statistical reality—of a better life through remarriage.

There is little statistical likelihood that a shattered marriage or a deserted family among the poor and Negroes can be restored. Rephart, *ibid.* This is especially true where the deserted mother is being supported by welfare assistance: Harper and Skulnick, *Problems of the Family,* p. 290 (Bobbs-Merrill, 1962). But the likelihood of remarriage after a divorce is great: some two-thirds enter a second marriage. Rephart, *supra,* at 609-610; see also, Jacobson, *American Marriage and Divorce,* p. 82 (Reinhart, 1959). And the prospects of success in the second marriage are at least favorable, if not excellent. Goode, *supra,* at p. 335; Bernard, *Remarriage, A Study of Marriage,* at p. 269 (Dryden Press, 1956); Lutz, *supra,* at pp. 61-2.

Remarriage may introduce economic stability to the home. More importantly, it brings in a father for the children. The effect of the absence of a father in a home has been clearly described in the "Moynihan Report," and is a particularly acute problem with Negro homes: *The Negro Family: The Case for National Action,* Moynihan (1965). It seems clear that both Negro mothers and children fare better emotionally and educationally with the presence of a father in the household. Lystad, *Family Patterns, Achievements and Aspirations of Urban Negroes,* 45 Sociology and Social Research, pp. 281-288 (1961); Parker and Kleiner, *Characteristics of Negro Mothers in Single-*

Headed Households, 28 J. Marriage and the Family, 507 (1966).

Further support for the preceding discussion may be found in a current book, Steinzor, *When Parents Divorce,* and several articles: Monahan, *When Married Couples Part,* 27 Am. Soc. Rev. 625 (1962); Locke & Klausner, *Marital Adjustment of Divorced Persons,* 33 Soc. and Soc. Research 97 (1948); and Locke, *Predicting Marital Adjustment by Comparing A Divorced And A Happily Married Group,* 12 Amer. Soc. Rev. 187 (1947).

This is not to suggest that the literature of sociology is conclusive. Nor is it to suggest that these Appellants will certainly find happiness if they obtain divorces. However, it does seem clear that Connecticut's policy of barring indigents from divorce does not save marriages. Rather, that policy leads to unstable homes, racked by desertion, emotional upset and financial distress. Such a policy is not consistent with due process of law.

VI.

The Relief Sought by Appellants Could Properly Have Been Rendered by the Court Below.

Appellants' prayer for relief asked the Court below to do three things. The first was to convene a three judge court to hear the case. This was done. The second was to declare unconstitutional the statute which requires indigents to pay court costs before they may sue for divorce in Connecticut. And the third was to compel the defendants to:

"(a) Accept for filing, without payment of fees and costs, the papers attached as Exhibit A [i.e., the divorced papers];

(b) Permit the named plaintiffs to proceed with their divorce actions without payment of fees and costs;

(c) Effect all necessary service and notice incident to the divorce actions without payment of fees and costs by the named plaintiffs;

(d) Take similar action with respect to future divorce proceedings initiated by other members of the class represented by the named plaintiffs."

The second and third prayers were not granted.

The reasons for the District Court's denial are not clear. The District Court distinguished the *Griffin* line of cases, discussed *supra*, III.A., by noting that there are "differences" between the right to freedom and the right to access to the court. 286 F. Supp. 972, 973. But, as noted earlier, these differences are superficial and hardly of constitutional moment. See dissent, *Williams* v. *Schaffer*, 385 U.S. 1037 (1967). The implication of *Griffin* for this case is clear.

The District Court went on to consider whether the State has a legitimate basis for imposing court fees. It found two. One was "providing financial support for the court establishment." But there is no basis whatsoever in the record for finding that such support is significant. Appellants have been advised* that revenue from filing fees is less than one-tenth of the total appropriated for the judi-

* See Exhibit #1, Attached.

cial department. In any event, the relevant statistic is not how many fees are now paid but how many cases might be prosecuted without fee if Appellants prevail. This, of course, is a matter of speculation. In any event, it hardly makes sense to impose financial requirements to raise revenue from the poor when they will be unable to pay the fees.

The second basis found by the District Court for justifying imposition of a fee system upon the poor was "discouraging resort to litigation in purely frivolous matters, which might more often be filed by indigent and affluent alike if the service were entirely free from cost." 286 F. Supp. 973. But this misses the point. Appellants did not seek total abandonment of the fee system. The fault in such a system is that it totally bars the poor from the courts, whether their litigation has merit or not. Eliminating this fault, at worst, would only permit frivolous litigation by the poor, while at the same time permitting them to bring meritorious litigation. The State, of course, would remain free to employ other means to preclude frivolous litigation.

Thus, the District Court's concern for the rationale of the fee system was not a proper basis for denying the relief sought by Appellants. The real reason apparently was that the District Court felt the issue posed by this case was an intractable problem, fit only for political solution. The Court below therefore hesitated to act "until the ordinary political processes have an opportunity to function in normal course." 286 F. Supp. 973.

Whether this abstention was proper or not is no longer material. The Connecticut legislature (as noted at p. 4 of BRIEF OF APPELLEES RE MOTION TO AFFIRM, filed in this Court) considered at the session which ended in

June, 1969 three separate bills which would have granted the relief Appellants seek. All three were defeated. Thus, the District Court's reliance upon the "normal course" was misguided.

Equally misguided was its conclusion that the problems posed by this suit are not susceptible of judicial resolution. The District Court said (286 F. Supp. 973):

> "Militating against striking down the present fee legislation by judicial fiat is the extreme difficulty of judicial determinaiton of the course the state should be required to follow."

The Court was concerned that determining the source from which funds should come and the expenses they should embrace were questions suitable for legislative resolution.

The Court thereby drifted into matters irrelevant to the controversy before it. Where the money would come from and what it would embrace were not the issues for resolution by the District Court. It had only to act upon Appellants' prayer for relief. It had only to determine that the State was improperly barring Appellants from its courts and order the State to remedy this situation. The State would then be free to select the remedy.

Instead, the Court below conjured up a host of problems and then concluded they were difficult of solution. So much may be conceded. But this does not justify the conclusion of the court below that the judiciary is therefore unable to grant relief. It is probably true that every constitutional case raises problems which might be resolved by legislation. Yet courts do not therefore abandon the Constitution. This seems so self evident as not to require authority,

although a brief reference may perhaps be appropriate to *Gideon* v. *Wainwright,* 372 U.S. 335 (1963) and *Griffin* v. *Illinois,* 351 U.S. 12 (1956).

The practical problems of granting relief here are readily soluble. The state courts need only file Appellants' papers without fees and arrange service. It is that simple. If the State wishes to devise more complex solutions, it is free to do so, but not as a basis for denying a legitimate constitutional claim. And if the State is confronted with practical problems, they may be attributed to the State's own inaction; inaction which denies Appellants' constitutional rights.

But the practical problems of granting relief are negligible here when compared with other cases which have been before this Court. *Gideon* v. *Wainwright, supra,* had enormous consequences for the criminal processes of every state in this nation. Yet Gideon was not denied relief. The one-man-one-vote rule of *Baker* v. *Carr,* 369 U.S. 186 (1962) restructured the political fabric of the state and local government in this country. But this court nevertheless granted relief which was clearly right. And the decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954) reworked the social order of this nation in such a far-reaching manner that its implications may never be fully realized. The practical problems posed by this present suit are simply not of the magnitude of these earlier cases.

Yet the constitutional issues raised by Appellants are equal in importance to those involved in *Brown, Gideon* and *Baker* v. *Carr, supra.* It is strangely inconsistent for the District Court to contend that these issues are so difficult as to defy judicial resolution and yet, at the same time,

conclude that they are inconsequential and not of constitutional dimension. The simple fact is that this case tests one of the basic promises of our Constitution. The Fourteenth Amendment guarantees equal protection and due process for "all." Appellants maintain that "all" includes even those indigent litigants who are barred from state courts by reason of poverty. If this view is correct, Appellants must prevail.

Nothing could be more fundamental, clear and appropriate for judicial resolution.

Conclusion

This case is wholly susceptible of judicial resolution. While the Connecticut legislature could also act to provide the relief Appellants seek, it has chosen not to do so. Connecticut's courts remain closed to the poor.

The Sovereign covenanted centures ago in the Magna Charta not to sell justice. This Court acknowledged that pledge two decades ago in *Griffin* v. *Illinois*. It is time now to extend simple justice to Gladys Boddie and her co-Appellants.

Respectfully submitted,

ARTHUR B. LAFRANCE, Esq.
Attorney for Appellants
College of Law
Arizona State University
Tempe, Arizona 85281

Certificate of Service

I, ARTHUR B. LAFRANCE, attorney for the plaintiffs, depose and say that on the 1st day of August, 1969, I served a copy of the foregoing Brief on the defendants by mailing copies first class postage prepaid to the following attorneys of record:

Robert K. Killian, Raymond J. Cannon,
Edward J. Peters, 30 Trinity Street,
Hartford, Connecticut.

/s/ ARTHUR B. LAFRANCE

Sworn to and subscribed before me, this 1st day of August, 1969.

KATHRYN PARKER JOHNSON
Notary Public
My Commission Expires Oct. 30, 1971

(Seal)

EXHIBIT 1

Report of
John P. Cotter
Justice, Supreme Court
Chief Court Administrator

Hartford, Connecticut
March 1969

GENERAL STATUTES § 51-2.

"There shall be a chief court administrator who shall, upon nomination of the governor, be appointed by the general assembly from among the judges of the supreme court . . . The chief court administrator shall be the administrative director of the judicial department and responsible for the efficient operation thereof and of its constituent courts . . . and for the expeditious dispatch of litigation therein and the proper conduct of the business of said courts."

APPENDIX C

FISCAL STATISTICS OF JUDICIAL DEPARTMENT

Fiscal Year	Appropriations	Expenditures	Revenues*	Collections**
1957-1958	$ 4,413,959	$ 4,409,744	$1,014,364	$ 921,788
1958-1959	4,863,499	4,640,440	1,060,712	1,110,415
1959-1960	4,968,320	4,931,610	1,249,738	1,785,944
1960-1961	8,093,283	6,903,048	1,252,523	2,389,971
1961-1962	9,163,915	8,726,328	1,177,318	3,415,994
1962-1963***	9,522,111	9,307,004	4,544,061***	7,464,306***
1963-1964	9,888,089	9,728,250	4,662,664	9,240,157
1964-1965	10,262,689	10,257,612	5,197,607	11,582,857
1965-1966	12,508,302	12,466,373	5,950,454	13,813,596
1966-1967	14,633,061	13,745,493	6,216,264	15,847,850
1967-1968	15,614,618	15,571,378	6,505,636	18,387,383

*Money deposited to the general fund received from court fees, fines, and forfeitures.

**Money collected by various divisions of the court, principally the family relations division of the Superior Court, domestic relations division of the Circuit Court, and the Bureau of Support, and transmitted to either the Welfare Dept. or some other beneficiary of the court order.

***Commencing this year, the reported figures reflect the full impact of the new Circuit Court system.

STATE OF CONNECTICUT
JUDICIAL DEPARTMENT

JOSEPH J. KEEFE
EXECUTIVE SECRETARY

July 24, 1969

P. O. ADDRESS
BOX 1559, HARTFORD, CONN. 06101

John R. Williams, Esq.
New Haven Legal Assistant Association, Inc.
Legal Aid Bureau
169 Church Street
New Haven, Connecticut 06510

Dear Mr. Williams,

The following chart depicts revenue received from entry fees in the Supreme Court, the Superior Court, and the Court of Common Pleas, and revenue received from fees (including the entry fee, copy fees, etc.) in the Circuit Court for fiscal 64-65 through fiscal 67-68.

	Supreme	Superior	Common Plea	Circuit
64-65	$ 4,620	$324,595	$133,120	$498,985.10
65-66	5,544	324,566	148,020	528,171.19
66-67	5,016	344,835	144,240	591,066.82
67-68	10,575	704,180	208,250	635,931.20

Since the Circuit Court reports revenue in four categories, namely, motor vehicle, criminal, civil, and parking, and does not break down the fees received under the category "civil", the figures listed above for the Circuit Court necessarily include not only revenue from entry fees but also for all other fees received in civil cases. Since 42,796 civil cases ($7 entry fee) and 57,509 small claims ($3 entry fee) were returned to the Circuit Court in 67-68, my mathematics tell me that of the $635,931.20 received for civil fees $472,099 was received for entry fees.

Sincerely,

Joseph J. Keefe

Executive Secretary

JJK:jr

cc: Mr. Edward Criscuolo
Mr. John J. Nachyly

Office-Supreme Court
FILED
OCT 13 1969
JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

MOTION FILED
AUG 7 1969

No. 81

RECTOR SIMMONS, JR. and ROSE SIMMONS,
Appellants,

—v.—

THE HOUSING AUTHORITY OF WEST HAVEN, CONNECTICUT,
Appellee.

ON APPEAL FROM THE APPELLATE DIVISION
OF THE CONNECTICUT CIRCUIT COURT

No. ~~865~~ 27

GLADYS BODDIE, *et. al.*,
Appellants,

—v.—

THE STATE OF CONNECTICUT, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. ~~866~~ 28

LEILA MAE SANKS, nee JONES and CLIFFORD SANKS,
Appellants,

—v.—

THE STATE OF GEORGIA, *et al.*,
Appellees.

ON APPEAL FROM THE GEORGIA STATE SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE CENTER ON SOCIAL WELFARE POLICY AND LAW, THE NATIONAL HOUSING LAW PROJECT AND COMMUNITY ACTION FOR LEGAL SERVICES, INC.

PAUL M. DODYK
LUCY V. KATZ
401 West 117th Street
New York, N. Y. 10027

Attorneys for the Center on Social Welfare Policy and Law

JOHN DeWITT GREGORY
NAPOLEON B. WILLIAMS
80 William Street
New York, N. Y. 10038

Attorneys for Comunity Action for Legal Services, Inc.

KENNETH PHILLIPS
MYRON MOSKOVITZ
PETER HONIGSBERG
Earl Warren Legal Institute
University of California
Berkeley, California 94720

Attorneys for the National Housing Law Project

INDEX

PAGE

Motion for Leave to File Brief *Amici Curiae* and Statement of Interest of the *Amici* 2

Brief *Amici Curiae* 8

Statement of the Cases 8

Introduction and Summary of Argument 11

ARGUMENT

I. The Equal Protection clause prohibits states from denying Court access to poor persons seeking to protect their homes or adjudicate their marital status 15

A. Classifications Based on Poverty Contravene Equal Protection Unless Justified by Some Compelling State Interest 19

B. Access to the State Courts in Eviction and Divorce Proceedings Is a Right of Fundamental Importance Which May Not Be Denied to the Poor Unless Justified by a Compelling State Interest 21

C. There Is No Justification for the Practices Challenged Herein 25

D. Conclusion of Equal Protection Argument .. 29

II. Requiring court fees or costs of an indigent litigant as a condition to asserting his rights before a court of law deprives him of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution .. 30

PAGE

A. The Right to a Hearing Before a Court of Law Cannot Be Made Dependent on the Ability to Pay Certain Fees or Costs 30

B. The Financial Requirements Challenged by Appellants Herein Are an Arbitrary and Unreasonable Restriction Upon the Judicial Process 35

C. Appellants Are Being Deprived of Rights Under the Due Process Clause 37

III. Conditioning access to the Courts on posting bond or fees deprives appellants of freedom of expression and association and the right to petition the Government for redress of grievances in violation of the First and Fourteenth Amendments to the United States Constitution 40

A. Access to the Courts Is a Form of Expression and a Means of Petitioning the Government for Redress of Grievances Which Is Protected by the First Amendment 40

B. The Imposition of Costs for Divorce Proceedings Inhibits Appellants' Exercise of Their Freedom of Association and Right to Marry and Procreate 44

CONCLUSION 46

APPENDIX

Publicly Funded Programs Providing Legal Services to the Poor Cannot Supply Bonds for Litigation Purposes 47

Table of Authorities

PAGE

Cases:

Anders v. California, 386 U. S. 738 (1967) 34

Baggett v. Bullett, 377 U. S. 360 (1964) 41
Bolling v. Sharpe, 347 U. S. 497 (1954) 36
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673 (1930) 30, 31-32
Brotherhood of Railway Trainmen v. Virginia, 377 U. S. 1 (1964) 40
Burns v. Ohio, 360 U. S. 252 (1959) 20, 24, 34

Carrington v. Rash, 380 U. S. 89 (1965) 15
Chambers v. Baltimore & Ohio R.R., 207 U. S. 142 (1907) 21, 22
Chicago, St. Louis Ry. v. Moss, 60 Miss. 641 (1882) 19
Coe v. Armour Fertilizer Works, 237 U. S. 413 (1915) 30, 31
Covey v. Somers, 351 U. S. 141 (1956) 30, 32

Damico v. State of California, 389 U. S. 416 (1967) 41
Draper v. Washington, 372 U. S. 487 (1963) 20, 35

Edwards v. California, 314 U. S. 160 (1941) 20, 21
Edwards v. Habib, 397 F. 2d 687 (1968) 23, 33, 42
Engel v. Vitale, 370 U. S. 421 (1962) 41
Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U. S. 214 (1958) 35

Forbes v. Board of Commissioners, 258 U. S. 338 (1922) 39
Frank v. Mangum, 237 U. S. 309 (1914) 34
Freedman v. Maryland, 380 U. S. 51 (1965) 41

PAGE

Giozza v. Tiernan, 148 U. S. 657 (1892) 36
Greene v. McElroy, 360 U. S. 474 (1959) 41
Griffin v. Illinois, 351 U. S. 12 (1956) 20, 24, 25, 34, 37
Griswold v. Connecticut, 381 U. S. 479 (1965) 44, 45
Gulf, Colorado & Western Ry. v. Ellis, 165 U. S. 150 (1897) 15, 18

Hackin v. Arizona, 389 U. S. 143 (1967) 42
Harman v. Forssenius, 380 U. S. 528 (1965) 32
Harper v. Virginia Board of Elections, 383 U. S. 663 (1966) 20, 23, 24
Holmes v. New York City Housing Authority, 398 F. 2d 262 (2d Cir. 1968) 41-42
Holt v. Virginia, 381 U. S. 131 (1965) 39
Hovey v. Elliot, 167 U. S. 409 (1897) 30

Jacobellis v. Ohio, 378 U. S. 184 (1964) 41
Jeffrys v. Jeffrys, 58 Misc. 2d 1045 (N. Y. Sup. Ct., Kings Co., 1968) 28
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 (1951) 31
Jones v. Union Guano Co., 264 U. S. 171 (1924) 35

Kelly v. Wyman, 294 F. Supp. 887 (S. D. N. Y. 1968), probable juris. noted, April 21, 1969, 37 U. S. L. W. 3399 (1969) 42
King v. Smith, 392 U. S. 309 (1968) 41

Lane v. Brown, 372 U. S. 477 (1963) 34
Leeper v. Texas, 139 U. S. 462 (1890) 36
Loving v. Virginia, 388 U. S. 1 (1967) 39, 45

PAGE

Maynard v. Hill, 125 U. S. 190 (1888) 39, 45
McLaughlin v. Florida, 379 U. S. 184 (1964) 19
Meyer v. Nebraska, 262 U. S. 390 (1923) 45
Missouri Pacific Ry. Co. v. Tucker, 230 U. S. 340 (1913) 37
Morey v. Doud, 354 U. S. 457 (1957) 32
Morgan v. United States, 304 U. S. 1 (1938) 30
Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950) 30, 32
Murdock v. Pennsylvania, 319 U. S. 105 (1943) 32, 41

NAACP v. Button, 371 U. S. 415 (1962) 40
Near v. Minnesota, 283 U. S. 697 (1931) 41

Ownbey v. Morgan, 256 U. S. 94 (1921) 35

Pasqua v. DeMarchi (N. Y. Sup. Ct. App. Div. 4th Dept., January 1969) 42
Pierce v. Society of Sisters, 268 U. S. 510 (1925) 44, 45
Pritchard v. Norton, 106 U. S. 124 (1882) 38, 39

Reste Realty Corp. v. Jay M. Cooper (N. J. Supreme Ct. No. A-45, March 17, 1969) 42
Rinaldi v. Yeager, 384 U. S. 305 (1966) 34

Schenck v. United States, 249 U. S. 47 (1919) 41
Schroeder v. New York, 371 U. S. 208 (1962) 30
Shapiro v. Thompson, —— U. S. ——, 89 S. Ct. 1322 (1969) 20, 41
Shelley v. Kraemer, 334 U. S. 1 (1948) 38
Skinner v. Oklahoma, 316 U. S. 535 (1942) 19, 44, 45
Smith v. Bennett, 365 U. S. 708 (1961) 20, 24, 34
Sniadach v. Family Finance Corp., —— U. S. ——, 89 S. Ct. 1820 (1969) 31, 42

PAGE

Thompson v. City of Louisville, 362 U. S. 199 (1960) .. 30
Thorpe v. Durham Housing Authority, 380 U. S. 670 (1967), —— U. S. ——, 37 U. S. L. W. 4068 (1969) .. 42
Truax v. Corrigan, 257 U. S. 312 (1921) 36

United Mine Workers of America v. Illinois State Bar Association, 389 U. S. 217 (1967) 40, 44
United States v. Carolene Products Co., 304 U. S. 144 (1938) 19

Waskey v. Chambers, 224 U. S. 564 (1912) 38
Western Union Tele. Co. v. Kansas, 216 U. S. 1 (1909) 32
Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1969) 41
Williams v. North Carolina, 325 U. S. 226 (1944) 38

Yick Wo v. Hopkins, 118 U. S. 356 (1886) 15

Constitutional Provisions:

United States Constitution

First Amendment 14, 22, 40, 43, 44

Sixth Amendment 25

Fourteenth Amendment 12, 14, 15, 29, 30, 33, 40, 44, 46

Federal Statute:

42 U. S. C. §1983 81

Connecticut Statute:

Conn. General Stat. §52-542 10

Georgia Statutes:

Georgia Code Ann. §§61-301, 61-302, 61-304 8

PAGE

Other Authorities:

American Law of Property, Vol. I, §3.38, p. 252 (1952) 38

Klevens, "Poverty and Equal Access to the Courts: the Constitutionality of Summary Dispossess in Georgia," 20 Stanford L. Rev. 766 (1968) 32

Powell, The Law of Real Property, Vol. 2 §221, p. 177 (1967) 38

"Public Provision for Costs and Expenses of Civil Litigation," Report of the American Bar Foundation, June, 1966, p. 10 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 81

RECTOR SIMMONS, JR. and ROSE SIMMONS,

Appellants,

—v.—

THE HOUSING AUTHORITY OF WEST HAVEN, CONNECTICUT,

Appellee.

ON APPEAL FROM THE APPELLATE DIVISION OF THE CONNECTICUT CIRCUIT COURT

No. 265

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, CATHERINE STRAIN, MARRY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,

Appellants,

—v.—

THE STATE OF CONNECTICUT; EDWARD HOROWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 266

LEILA MAE SANKS, nee JONES and CLIFFORD SANKS,

Appellants,

—v.—

THE STATE OF GEORGIA; THE HOUSING AUTHORITY OF THE CITY OF ATLANTA, and HARRY R. CHANCE,

Appellees.

ON APPEAL FROM THE GEORGIA STATE SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND STATEMENT OF INTEREST OF THE *AMICI*

Movants Center on Social Welfare Policy and Law, National Housing Law Project and Community Action for Legal Services, Inc., respectfully move the Court for permission to file the attached brief *amici curiae* for the following reasons. The reasons assigned also disclose the interest of the *amici.*

(1) The Center on Social Welfare Policy and Law is the specialized law reform resource of the Legal Services Program of the Office of Economic Opportunity. Affiliated with the School of Law of Columbia University, the Center undertakes research pertaining to the legal rights of the poor, particularly as to public assistance and other government benefit programs, and supports other OEO-funded legal services programs through education and assistance in the preparation of important litigation. The Center also maintains the nation's only comprehensive private collection of state public assistance regulations and manuals.

(2) The Center has concerned itself with many basic legal issues affecting poor persons, involving public assistance, housing, and food and agricultural programs. In working with lawyers serving the poor on these and many other issues, the Center has become acutely aware of the very basic procedural problems faced by poor persons before they are able to assert their substantive legal rights. Among these problems are the financial barriers imposed by just such statutes as are at issue in the three cases considered herein.

(3) The National Housing Law Project was instituted by the Office of Economic Opportunity in recognition of the marked increase in legal service activities in the housing and urban law area. The Project provides specialists' services to neighborhood legal service lawyers and performs independent activities in the areas of private landlord-tenant relations, urban renewal, sponsorship of low-income housing production, and other matters relating to housing and urban affairs. The Project maintains extensive resources of information in all of these areas.

(4) The handicaps faced by the low-income tenant in eviction proceedings are of particular concern to the Project and the offices it serves. Chief among these is the necessity to post bond at various stages of an eviction proceeding, a requirement which inhibits both the assertion of private rights and the creation of meaningful new protections for all tenants.

(5) Both the Center and the National Housing Law Project provide services to the approximately 265 Legal Services Projects in the United States, which are staffed by

more than 1800 attorneys. These attorneys advise and represent approximately 500,000 low-income clients annually. The *amici* believe that all legal service lawyers are severely handicapped in their ability to serve their clients by financial barriers to judicial proceedings. Therefore they have a vital interest in presenting to this Court the full range of issues raised by this case.

(6) Community Action for Legal Services, Inc. ("CALS") is the central coordinating corporation for ten other corporations which provide free legal services to the indigent in the twenty-six designated poverty areas of New York City. CALS is a special community action program funded by the United States Office of Economic Opportunity under the provisions of Section 222(a) (3) of the Economic Opportunity Act, 42 U. S. C. §2809 (a) (3) (1967). Permission for CALS to practice law pursuant to Section 495(5) of the Judiciary Law was granted by the Appellate Division, First Department, on October 10, 1967.

(7) As the entity charged with the primary responsibility for providing free legal services to residents of the poor neighborhoods of New York City, CALS has an obvious and immediate interest in legal issues affecting the indigent. Since, as will be subsequently demonstrated, the instant cases present significant questions relating to the right of access to the courts by poor persons in order to vindicate statutorily granted rights and remedies, CALS respectfully seeks the permission of this Court to intervene as *amicus curiae* in support of appellant's motion for leave to appeal herein.

(8) Counsel for all appellants have consented to the filing of a brief *amici curiae* by the movants. Counsel for appellees have not consented.

Wherefore, movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectfully submitted,

PAUL M. DODYK
LUCY V. KATZ
401 West 117th Street
New York, N. Y. 10027

Attorneys for the Center on Social Welfare Policy and Law

KENNETH PHILLIPS
MYRON MOSKOVITZ
PETER HONIGSBERG
Earl Warren Legal Institute
University of California
Berkeley, California 94720

Attorneys for the National Housing Law Project

JOHN DEWITT GREGORY
NAPOLEON B. WILLIAMS
80 William Street
New York, N. Y. 10038

Attorneys for Community Action for Legal Services, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 81

RECTOR SIMMONS, JR. and ROSE SIMMONS,
Appellants,

—v.—

THE HOUSING AUTHORITY OF WEST HAVEN, CONNECTICUT,
Appellee.

ON APPEAL FROM THE APPELLATE DIVISION OF THE CONNECTICUT CIRCUIT COURT

No. 265

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, CATHERINE STRAIN, MARRY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,
Appellants,

—v.—

THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 266

LEILA MAE SANKS, nee JONES and CLIFFORD SANKS,
Appellants,

—v.—

THE STATE OF GEORGIA; THE HOUSING AUTHORITY OF THE CITY OF ATLANTA, and HARRY R. CHANCE,
Appellees.

ON APPEAL FROM THE GEORGIA STATE SUPREME COURT

BRIEF *AMICI CURIAE*

Statement of the Cases

***Sanks* v. *Georgia*, No. 266.**

Appellants are tenants in a publicly owned housing development in Atlanta, Georgia. They received a notice of eviction for nonpayment of rent based on an affidavit filed with the court by their landlord. Under Georgia Code Ann. §§ 61-301 and 302 such an affidavit is sufficient to bring about the issuance of a dispossessory warrant ordering the Sheriff or Marshal to evict the tenant and his possessions. The tenants sought to raise several defenses to the eviction by filing a counter affidavit and obtaining a trial on the facts at issue.

In order to file such an affidavit, Georgia Code Ann. §61-304 requires that the tenant "tender a bond with good security payable to the landlord, for the payment of such

sum, with costs, as may be recovered against him on the trial of the case." The amount of the bond normally includes *twice* the amount of rent due and owing when the tenant vacates the premises, which amount the tenant may be subject to pay should he be found to have unlawfully stayed over. The amount of the bond is typically based upon six months to one year's rent, thereby requiring a total sum of as much as twice one year's rent plus costs.

Tenants were unable to afford the costs of the required security bond, for which they would have had to post full collateral. They were consequently foreclosed under the Georgia statutes from any hearing whatever of their defenses to the attempted eviction and were rendered vulnerable to summary eviction. No similar bonds, obligations or restrictions are placed upon landlords.

The Fulton County, Georgia, Civil Court, held that the summary eviction procedures herein at issue are violative of plaintiffs' constitutional rights under the Equal Protection and Due Process clauses of the United States and Georgia Constitutions as well as the Access to the Courts clause of the Georgia Constitution. Georgia Civil Court, Fulton County, Warrant Nos. 63610, 69418 and 66636 (October 2, 1968). This decision was reversed by the Georgia Supreme Court. *State of Georgia* v. *Sanks*, Nos. 603, 604 (January 23, 1969). In a companion case, the same court held that requiring the double rent judgment was not violative of either Equal Protection or Due Process. *Meltzer* v. *C. Buck LeCraw and Co.*, Georgia Supreme Court No. 605 (January 23, 1969).

***Simmons* v. *West Haven Housing Authority*, No. 81.**

Appellants were tenants in a public housing development run by the West Haven Housing Authority. As in *Sanks*, they were the subject of summary eviction proceedings. They raised several special defenses in the Connecticut trial court, but that court ruled against them, making no mention of those special defenses. Tenants' attempted appeal was frustrated by the Connecticut statutory requirement that a bond be posted with surety to secure the landlord for all rent which may become due during the pendency of the appeal before a tenant in possession may appeal. Conn. General Stat. § 52-542. Lacking full collateral for the amount of the required bond (approximately $432 for six months' rent) tenants were unable to appeal the merits of their claim. Tenants then requested leave to pay rent monthly into court in lieu of a full bond during the pendency of the appeal. The trial court refused their request and ordered immediate eviction.

The Connecticut Circuit Court, Appellate Division, dismissed plaintiffs' appeal of the trial Court's refusal to waive the bond requirement and held the requirement constitutional. *Simmons* v. *West Haven Housing Authority*, File No. CV 8-677-5985 AP (March 7, 1968). Certification for review by the Supreme Court of Connecticut was denied (June 25, 1968). Tenants have deposited $360 with the Connecticut Circuit Court, as rent for the five months during which they remained in possession after the judgment of eviction. This money has not been returned to plaintiffs and will be used to secure the Housing Authority's claim for rent owed during the *Simmons* tenancy should plaintiffs' appeal be allowed to proceed without bond.

***Boddie* v. *Connecticut*, No. 265.**

Appellants are recipients of public assistance who desire to file for divorce in the Connecticut state courts. They are unable to tender the necessary fees for filing and service of process which, in such actions, range from $55 to $195.[1] Since appellants receive only a bare subsistence allowance, all of which must be used for food, shelter and personal needs, they will never be able to put aside the sum required for divorce in Connecticut. They are therefore prohibited from remarrying and from establishing a self-supporting family unit for themselves or their dependent children, solely because of their poverty. Appellants seek reversal of a three-judge federal district court decision upholding the constitutionality of the Connecticut practices. *Boddie* v. *Connecticut*, 286 F. Supp. 968 (D. Conn. 1968).

Introduction and Summary of Argument

Amici adopt the unusual course of submitting a single brief in the *Boddie*, *Sanks* and *Simmons* cases because of their conviction that these cases present a single fundamental issue: namely, whether a court of the United States may determine issues of crucial importance to the involved individuals—shelter and marital status—while denying these individuals a hearing because of their poverty.

Amici's basic contention is that a United States court may not constitutionally refuse to adjudicate a person's marital status, nor deprive a person of his home because

[1] Forty-five dollars to court as filing fee; $10 to $15 to sheriff for personal service; or $100 to $150 to a newspaper for service by publication.

that person is too poor to afford the statutorily imposed costs of justice. This position is, in our view, a necessary corollary of the most fundamental precepts of American constitutional democracy. At the very core of our own image of ourselves as a free people is the notion of limited government, which means, above all, a government that is permitted to exert its coercive force only in accordance with law. Central to such limitation in the use of force, to limited government, to freedom itself, is access to the courts, which in the United States have been uniquely charged with ultimate responsibility for ensuring that the coercive powers of government are exerted lawfully and for protecting individual liberties by so limiting the use of coercive force. *Boddie, Sanks* and *Simmons* present this issue in its most elemental form, seeking, on the one hand, a full and fair hearing of their claim that their landlord's attempt to evict them from their dwellings is unlawful and, on the other, an adjudication of marital status upon which the possibilities of future marital associations, of reconstructed family life, of freedom from the coercion of cruelly irrelevant criminal sanctions all depend.

So fundamental are appellants' claims to the institutions upon which our traditions of limited government and freedom are founded that they can be articulated in terms of a number of particular, traditionally recognized constitutional doctrines.

Equal Protection

The practices challenged herein are unconstitutional first because they deny the individuals involved the equal protection of the laws guaranteed to all persons by the Fourteenth Amendment. They deny them equal protection be-

cause they deprive them of the opportunity to plead their case for a reason which bears no rational relation to their just entitlement to a hearing.

Moreover, one deals here not with arbitrary and unreasoning caprice, but with something much worse, more clearly offensive to equal protection. One deals with a practice which, whether by design or inadvertence, imposes a distinctively harsh and restrictive regime upon the poor, a practice which denies the poor alone the power to protect their homes and reorder their shattered marital destinies. Because the practices challenged involved a discrimination based upon indigence, they, like other classifications based on status—race, nationality, religion, illegitimacy—must fall unless the state can produce a compelling justification which can be served by no less offensive means.

Finally, one deals here with matters traditionally recognized as being peculiarly within judicial competence: access to the courts, access to resolution of issues of central significance to the persons involved: shelter and marital status. Where matters of such character are involved, the courts have long and appropriately applied the most stringent standards in assessing proffered justifications. By such standards, the practices challenged herein must fall.

Due Process

No person may be deprived of life, liberty or property without due process of law. Of the various particular requirements which courts have over the years distilled from this most basic of our constitutional protections, the most central is the notion that the government may not apply its coercive powers against an individual without first per-

mitting the individual a hearing. Reduced to its simplest terms, appellants here seek no more than a full and fair hearing before the coercive powers of the state are applied to destroy a home and perpetuate a marital status which time long ago rendered a fiction.

First Amendment

The practices challenged herein also involve grave implications for First Amendment freedoms, rendered applicable to the states through the Fourteenth Amendment. The results reached below deny appellants their constitutionally guaranteed right to petition the government for the redress of grievances. The right to petition the government for the redress of grievances includes access to the judiciary. Foreclosing such access because of a person's indigence is not a reasonable regulation of access to the courts. Particularly are such practices unreasonable burdens on the right to petition the government where access to the courts is sought for the urgent purpose of defending one's home or securing adjudication of marital status.

The family is an association within the protections accorded associations by the First and Fourteenth Amendments. The refusal to permit appellant a resolution of her marital status denies her the freedom to form a new family, immures her in a marital status which has no reality, and exposes her to criminal sanctions should she seek to establish a new family. Appellant is denied her freedom of association not because she does not meet the substantive standards required by the state but because she is too poor to purchase access to the courts. To deny a person freedom of marital association because of her indigence is to impose an impermissible burden on freedoms guaranteed by the First and Fourteenth Amendments.

ARGUMENT

I.

The Equal Protection clause prohibits states from denying Court access to poor persons seeking to protect their homes or adjudicate their marital status.

The Equal Protection clause of the Fourteenth Amendment imposes on all state action the minimal requirement that distinctions in the implementation of public policy bear some rational relation to the objectives of that policy. Amici contend that the practices involved in *Boddie, Sanks,* and *Simmons* fail to meet even this minimal requirement because these practices bar persons from access to State Courts for a reason—their poverty—which bears no rational relationship to the primary purpose served by such access. See, *inter alia, Gulf, Colorado & Western Ry.* v. *Ellis,* 165 U. S. 150 (1897); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Carrington* v. *Rash,* 380 U. S. 89 (1965).

There can be no doubt that the charges imposed by the States of Georgia and Connecticut effectively bar the poor from such access. The tenants' evidence of their inability to post the required bond in *Sanks* was uncontradicted; in *Simmons,* the Connecticut courts did not dispute that the charges would bar appellants from an appeal; in *Boddie,* Judge Smith, dealing with a motion to dismiss, clearly assumes that "these plaintiffs are effectively barred from bringing suit by the filing fee and other costs." 286 F. Supp. 968, 972. The showing of incapacity made by appellants below is characteristic of the problem which confronts the poor. The base amount of the bond required in the *Sanks* and *Simmons* cases typically ranges from six months' to one year's rent. In Georgia, moreover, prevail-

ing practice normally requires that bond be posted for twice the rent potentially owing to ensure payment of the double-rent penalty. In *Boddie,* the practices challenged typically require payments ranging between $50. and $200. That payments of such amounts are beyond the reach of the poor should require no elaborate demonstration. Particularly is this clear in the case of welfare recipients, such as some of the appellants, whose only source of support is carefully calculated to make saving impossible and is, moreover, reduced to exhaust any significant receipts or savings which may perchance occur. Moreover, it cannot be said that the resources of the expanding legal services programs avoid such preclusion by making the needed resources available. See the Appendix hereto for Amici's collection of information on this point.

It would therefore be inaccurate and misleading to conceive of the practices here involved simply as charges or taxes. It is of crucial importance never to lose sight of the fact that from the standpoint of foreclosing judicial access, there is no difference between the practices challenged and an outright ban on paupers. Put most simply, the issue is whether a State may *bar* the poor from its courts in summary eviction and divorce proceedings.

Foreclosing the poor from judicial access while affording it to the affluent creates a distinction which bears no rational relationship to the purposes which the judiciary serves in eviction and divorce proceedings. In an eviction proceeding, the court sits to determine who is lawfully entitled to possession of real estate, to adjudicate conflicting claims to dominion over property. It is in relation to this primary purpose that any denial of access, and the distinctions which such denial imports, must first be judged. When so evaluated, the essential irrationality of

the Connecticut and Georgia practices clearly emerges. Can it be said that this purpose provides any basis for justifying distinctions based on poverty and affluence? Can it be said that the poor as a class are not in need of such access? Like others, indeed with greater frequency, the poor are tenants in this world, and as these cases testify, the poor are often in need of protection against their landlord's predations. Can it be said that a man's poverty is grounds for assuming that his defense to an eviction will lack merit? To ask these questions is to answer them, and more importantly, to reveal that there exists no rational relationship which would justify the exclusion of the poor from access to the judiciary in summary eviction proceedings.

In divorce proceedings, the court sits to determine whether the facts of a particular domestic situation meet the criteria which the state has established to govern the dissolution of marital unions, and to perform the subsidiary tasks of reconstituting the financial and, where there are children, the custodial basis of the future family. The State has, of course, a critical interest in the formation, stability and dissolution of families, an interest as parens patria which entails a greater measure of state involvement. However, neither this greater involvement nor the purposes which the judiciary serves in divorce proceedings provides any basis for excluding the poor as a class from courts in the adjudication of marital status. Indeed, the marital and family problems of the poor have gained wide recognition as one of our major contemporary social crises. One cannot say that because a woman is poor, she will have no need of judicial access in marital proceedings. One cannot say that because she is poor, her grounds for divorce will be frivolous. As in eviction proceedings, ex-

clusion of the poor from the courts bears no rational relationship to the purposes for which such access is generally afforded.

Amici's first point is then that when one clearly perceives the true nature of the practices challenged: exclusion of the poor from the courts; and couples this perception with an accurate articulation of the primary purposes served by court access in eviction and divorce proceedings, the essential irrationality of these practices becomes clearly apparent. Lacking any rational relationship to these primary purposes, the practices challenged herein fail of the minimal requirements of the equal protection clause for any government action and must accordingly be condemned as unconstitutional.

Appellants in *Sanks* and *Simmons* are denied equal protection not only because they are denied judicial access which is afforded to the affluent community but also because they are subjected to burdens not visited upon the adversary landlords. Though tenants must post bond to protect landlords against damages resulting from their defense of an eviction proceeding, no comparable obligation is imposed upon landlords to secure tenants against the potentially much more serious damages eventuating from a wrongful eviction. Such disparate treatment of adversaries to a lawsuit is flagrantly inconsistent with the duty of even-handed treatment of litigants which has been part of the equal protection clause since its earliest days. Thus in *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150 (1897), this Court condemned state legislation which permitted plaintiffs against railroad companies to obtain costs and punitive damages while denying correlative rights to

defendants. See also *Chicago, St. Louis Ry.* v. *Moss*, 60 Miss. 641 (1882), where classic statement is made of this governing principle:

> "All litigants, whether plaintiff or defendant should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal with others similarly situated." 60 Miss. at 646-7.

A. *Classifications Based on Poverty Contravene Equal Protection Unless Justified by Some Compelling State Interest.*

The standard which must be met in justifying a distinction utilized in the implementation of public policy is not uniform for all cases. The degree of latitude which this Court has allowed state legislatures in drawing such distinctions has varied with the circumstances involved. See, *inter alia, Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); *McLaughlin* v. *Florida*, 379 U. S. 184 (1964); *United States* v. *Carolene Products Co.*, 304 U. S. 144 (1938). It could hardly be otherwise. The importance of the private interests affected, judged both in terms of personal impact on the individuals involved and of constitutionally recognized values; the relative competence constitutionally assigned to the legislature and the judiciary over the matter in question; the character of the classification—all legitimately affect the stringency with which a court will examine proffered justifications. Amici contend that all these factors require that respondents in this case demonstrate not a mere rational relationship between distinction and purpose, but a compelling state interest which makes the distinction necessary for the attainment of critical state ends.

A compelling justification is required first because the classification here employed is one based on poverty, a factor which—like race, nationality and religion—is peculiarly offensive to our notion of equal protection because it burdens an individual because of his status. It deprives a person not because of what he has done, but because of what he is, and in so doing it denies him the right as a man to be treated as any other man. The practices herein challenged deny that a poor man is as good as any other man; they assume that he is not worthy of that hearing which his affluent brothers are accorded as a matter of right.

The particularly objectionable quality of classifications based on poverty has long been recognized by our courts. A state may not exclude persons from its boundaries because of their indigence, *Edwards* v. *California*, 314 U. S. 160 (1941); nor may it seek to deter the entry of indigents by denying public assistance, *Shapiro* v. *Thompson*, —— U. S. ——, 89 S. Ct. 1322 (1969); nor may it exclude the poor from its elections by burdening the franchise with taxes, *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966). Similarly, a state may not bar indigents from taking criminal appeals by requiring them to provide transcripts which are beyond their means, *Griffin* v. *Illinois*, 351 U. S. 12 (1956), *Draper* v. *Washington*, 372 U. S. 487 (1963); or by charging appellate docket and filing fees, *Burns* v. *Ohio*, 360 U. S. 252 (1959); nor may a state impose charges which preclude indigents from filing habeas corpus petitions, *Smith* v. *Bennett*, 365 U. S. 708 (1961).

The attitude taken toward classifications based on poverty by the judiciary of this country is perhaps best sum-

marized in Justice Jackson's concurring opinion in *Edwards v. California, supra*:

> "We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed or color." 314 U. S. at 184-5.

To exclude a person from access to the courts because of his poverty is to make use of a classification traditionally subject to the most searching appraisal by our courts. Where such exclusion bears no relation to the primary purpose served by such access, there can be no justification for it, let alone the compelling state interest which must be demonstrated to save it.

B. *Access to the State Courts in Eviction and Divorce Proceedings Is a Right of Fundamental Importance Which May Not Be Denied to the Poor Unless Justified by a Compelling State Interest.*

Demonstration of a compelling state interest in the practices challenged herein is also required because of the critical importance of court access to the persons involved and to the institutions established by our constitution. Where matters of smaller significance are involved, a lesser degree of justification may pass muster in defense of a distinction. But here we are concerned with one of the most fundamental of American constitutional rights. As this Court put the point in *Chambers v. Baltimore & Ohio R.R.*, 207 U. S. 142, 148 (1907):

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship."

Indeed, so fundamental is the right of access to the courts that it has long received constitutional protection wholly apart from the equal protection clause. Of importance to our constitutional system equal to that of equal protection is the right not to be deprived of life, liberty or property except by due process of law. Central to the concept of due process is the right to a hearing. It is no more than this that appellants in the *Sanks* and *Boddie* cases seek. Distinctions foreclosing to some a right which itself receives the independent protection of the due process clause can be accepted only if they are clearly justified by some compelling state interest, and as Amici have sought to demonstrate above, the distinctions here challenged are justified by no such interest.

Access to our judicial institutions is protected by the due process clause and the First Amendment because of the courts' critical role in maintaining our constitutional system and the liberties which that system protects. It is, as was said in the *Chambers* case above, a right which is conservative of all others. The right to possession of premises to which a tenant may be lawfully entitled, the right to form a new family cannot be effectively protected without the opportunity to be heard. Moreover, without such an opportunity, other rights may be sacrificed. An eviction may, under certain circumstances, constitute a punishment for exercise of the rights of free speech, free press or free

association. See, *inter alia, Edwards* v. *Habib,* 397 F. 2d 687 (1968). To ensure that such rights are conserved, access must be afforded.

In this respect, the cases here involved raise somewhat the same issue as that adjudicated by the Court in *Harper* v. *Virginia Board of Elections, supra,* where a Virginia poll tax was declared violative of the equal protection clause. Just as the Court there sought to protect the poor's access to the legislature by protecting their franchise, so here the court is asked to protect the poor's access to the courts. Indeed, in some respects, *Boddie, Sanks* and *Simmons* present a situation even more demanding of protection, for while the financial burden imposed by the Virginia poll tax was nominal, there can be no doubt that the charges here attacked are absolutely preclusive for the poor. Further, the right protected in *Harper,* the poor's right to the franchise, lacks the explicit constitutional recognition given the right to a hearing by the due process clause.

Access to state courts in divorce and eviction proceedings is critical not only because of the role which such access plays in our constitutional system; it is critical also because of its importance to the individual in purely personal terms. One need not elaborate on the significance to a man of the right to defend his own home; of the civil wrongs which could be perpetrated against an individual, few rise to the seriousness of the unlawful deprivation of his shelter. Similarly, the right to adjudication of marital status is the necessary prerequisite to remarriage and the reconstitution of shattered family destinies. Eloquent is the testimony of knowledgeable individuals of the hardship and disgrace enforced upon women in this country who, abandoned by their husbands and offered the opportunity of remarriage,

are barred by their poverty from securing judicial dissolution of marriages which have for years been fictions.

The character of the right involved in this case calls for the closest scrutiny not only because of its personal and constitutional significance but also because it is a right affecting the operation of the courts, an area in which this Court has long exercised distinctively far-reaching powers of review. These powers have been exercised in rightful recognition of the special competence with which the constitution endows the courts where matters of judicial access and operation are involved. Whatever deference may be accorded the legislature in dealing with matters such as economic regulation, legislative determinations affecting the operations of courts have always been much more a matter for judicial regulation. The extraordinary competence of the court in judicial matters has been reflected in numerous doctrinal developments, perhaps most notably in the development of safeguards in criminal proceedings over the past decades.

Included in this body of development are the *Griffin*, *Draper*, *Burns* and *Bennett* cases dealing with various aspects of the relationship between indigence and equal protection in the judicial process. The motivating spirit behind these cases is perhaps best summarized in the *Griffin* case where it is said:

> "There can be no equal justice when the kind of trial a man gets depends on the amount of money he has." 351 U. S. at 19.

Equal justice, equal protection of the laws was in those cases applied to ensure that an indigent defendant is not deprived of an appeal, of a transcript for appeal, or of an

opportunity to petition for a writ of habeas corpus. It is of course true that those cases involved criminal proceedings whereas we here speak of civil actions in divorce and eviction proceedings, but there is nothing in *Griffin* and its progeny which confine the doctrines there accepted to criminal cases. We speak here not of rights granted under the Sixth Amendment which pertain to criminal prosecutions exclusively. We speak of the equal protection of the laws which applies alike to civil and criminal causes. Moreover, appellants here seek not some recondite procedural privilege. The appellants in the *Sanks* and *Boddie* cases seek that most fundamental rudiment of due process, a hearing. Whatever doubts one may have about construing the equal protection clause to require that a state provide the poor with legal resources of a more marginal importance to the proper functioning of a judicial process, surely there should be none where what is involved is the bare right to a hearing in matters of critical importance to the individual.

C. *There Is No Justification for the Practices Challenged Herein.*

Thus, Amici contend that the practices challenged herein must be deemed violative of our basic guarantee of equal protection unless it can be shown that they serve some state interest of overriding importance. Amici have already attempted to demonstrate that exclusion of the poor from access to the courts bears no rational relation to the primary purpose served by such access. It remains to consider whether there is any secondary purpose whose service would warrant the foreclosure of indigent litigants. Three such ancillary purposes are commonly advanced in justification. First, it is said in cases of the *Sanks* and *Simmons* variety, that bonds are required to protect the

financial interest of the evicting landlord during the pendency of the eviction proceeding. Of this purported justification, many things may be said. First, there is the question of whether the state may adopt a mode of assuring the landlord's pecuniary interest which forecloses defense of the action. Even were there no other means of securing the landlord's rental interest, there would be substantial doubt as to the validity of any mechanism which assured one party's interests *pendente lite* at the cost of precluding any defense at all by the adverse party. But the ultimate unacceptability of such a defense is made plain by the existence of alternative mechanisms which would secure the landlord's financial interests without precluding the tenants' defense. The landlord's rental interest is adequately served by the requirement that rental payments currently owing be paid to a court-appointed receiver. Such a scheme would protect the landlord while allowing the tenant his day in court.

Also commonly proffered are the somewhat different justifications to the effect that the fees are necessary to deter frivolous litigation and that they are necessary for revenue raising purposes. Turning to the latter justification, one notes first that the fees involved support but a small fraction of the costs of adjudicating marital status in Connecticut and that the revenue raised thereby constitutes an insignificantly small fraction of Connecticut's revenues. This latter fact makes it abundantly clear that it is wholly misleading to speak of the "necessity" of state financing through the imposition of such charges. The State of Connecticut has before it an infinite and bewildering variety of possible levies (none of which are pleasant to the payer, to be sure) to finance its expenditure. Most

of the major revenue-producing alternatives, such as the income tax and the sales tax, do not entail precluding the poor from the exercise of basic civil liberties. The statement that the levies herein challenged are "necessary" means only that the State of Connecticut has chosen to raise revenue in a way which precludes certain poor persons from instituting divorce actions when it could have as easily chosen a tax structure which did not entail such preclusive consequences.

Finally, it is said that the imposition of charges precludes the bringing of frivolous suits which will be brought in the absence of such charges. Passing the unrealistically misanthropic view which underlies such a justification, it should be noted that, whatever the validity of such a justification in other circumstances, it is strikingly inapposite to the matters at hand. In *Sanks* and *Simmons,* we are concerned with tenants *defending* eviction proceedings, rather than with the initiation of litigation. The floodgates are unlikely to be opened by litigants whose very presence in court is a response to an unwelcome offensive by their landlords. Similarly, matrimonial litigation is not often undertaken in a spirit of unrestrained frivolity. As the American Bar Foundation put the point in its investigation of such problems:

> "Some court proceedings, although in the form of litigation, are really not resolutions of disputes, but mere legal formalizations of arrangements worked out between parties nominally in legal conflict with each other. This is true of default matrimonial proceedings—divorce, annulment, separation—and, with certain qualifications, adoptions, 'no asset' bankruptcies, and perhaps certain other proceedings. In this type of case

> the public policy of deterring litigation (by imposing costs and fees as a condition of access to the courts) either does not apply at all, or at most, it applies in much weaker form. Yet costs are involved in such proceedings as in other judicial proceedings, and with similar differential deterrent effects on the poor as compared to others. The result is that a person of means may be able to obtain a legal formalization that a poor man cannot. This discrimination cannot be justified by the public policy of deterring litigation." "Public Provision for Costs and Expenses of Civil Litigation," Report of the American Bar Foundation, June, 1966, pp. 10-11.

Moreover, whatever the merits of such charges in deterring frivolous litigation, ultimately no system which precludes one-seventh of a nation from access to the courts can be justified as deterrence to occasional frivolity.

This conclusion—that no justification exists for practices which deprive the poor of court access—was recognized in the context of a divorce proceeding by the New York Supreme Court in *Jeffrys* v. *Jeffrys*, 58 Misc. 2d 1045 (N. Y. Sup. Ct., Kings Co., 1968). There the court found the imposition of preclusively expensive publication costs on the poor a violation of the Equal Protection clause, stating at 1056:

> "Marriage is clearly marked with the public interest. In this state, a marriage cannot be dissolved except by 'due judicial proceedings' (N.Y. Constitution, art. I sec. 9). We have erected by statute a money hurdle to such dissolution by requiring in many circumstances the service of a summons by publication . . . This hurdle is an effective barrier to Mrs. Jeffrys' access

> to the courts. The loss of access to the courts in an action for divorce is a right of substantial magnitude when only through the courts may redress or relief be obtained. Such a right is, it seems to me, as basic as Griffin's right to appeal and Mrs. Harper's right to vote. It is manifestly discriminatory under *Griffin* standards to deprive Mrs. Jeffrys of that right while affording it to others with money."

For the very same reasons, because of a similar lack of justification, Amici urge that the charges imposed in *Boddie* must fall.

D. *Conclusion of Equal Protection Argument.*

In sum, Amici's position is that the practices challenged herein contravene the equal protection clause of the Fourteenth Amendment because: (i) they bear no rational relation to the primary purposes underlying the creation of court access in eviction and marital proceedings; (ii) they constitute classifications based on poverty, traditionally suspect in this country; (iii) they deprive individuals of a basic civil right; and (iv) there are no ancillary purposes which can justify such practices.

In light of the above, Amici contend that the bond required in *Sanks* and *Simmons* and the charges imposed in *Boddie* constitute invidious discriminations violative of the equal protection clause.

To decide otherwise would render that noble engraving above this Court's pillars a mocking palimpsest wherein the discerning eye could see, beneath what is visible to all, the more revealing inscription: "No paupers allowed."

II.

Requiring court fees or costs of an indigent litigant as a condition to asserting his rights before a court of law deprives him of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

A. *The Right to a Hearing Before a Court of Law Cannot Be Made Dependent on the Ability to Pay Certain Fees or Costs.*

Appellants herein have all been deprived at various points in the litigative process of an opportunity to present their claims before a judicial tribunal. As a result they have been deprived of certain elements of property and liberty without the most basic requisite of due process of law—notice and an opportunity for a hearing. *Schroeder* v. *New York*, 371 U. S. 208 (1962); *Covey* v. *Somers*, 351 U. S. 141 (1956); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950); *Morgan* v. *United States*, 304 U. S. 1 (1938); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673 (1930); *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413 (1915).

In its most literal sense, the right to due process means the right to a hearing. *Hovey* v. *Elliot*, 167 U. S. 409, 413-14 (1897). If one cannot appear and present evidence and argument in his defense, the chances that he will be dealt with fairly are minimal. Without such safeguards as are provided by a trial which comports with due process, a citizen can be deprived of those things most dear to him through a secretive, farcical proceeding, or without any proceeding at all. (See, e.g., *Thompson* v. *City of Louisville*, 362 U. S. 199 (1960).)

At a minimum we know that due process mandates some sort of hearing at some time before the taking of life, liberty or property. *Coe* v. *Armour Fertilizer Works*, *supra*. Further, notice and hearing must be "aimed at establishing the validity, or at least the probable validity, of [a person's] underlying claim *before* he can be deprived of his property or its unrestricted use." *Sniadach* v. *Family Finance Corp.*, —— U. S. ——, 89 Sup. Ct. 1820, 1823 (1969). (Emphasis original.)[2]

The hearing must be "fair" and appropriate to the type of proceedings and the individual case.

> "[By] due process is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained, and it must give them an opportunity to be heard respecting the justice of the judgment sought. Hagar v. Reclamation District, 111 U. S. 701, 708."
>
> *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 161-62 (1951). (Frankfurter, *J.*, concurring.)

Furthermore, and this is crucial to the cases at bar, that opportunity must be real. *Brinkerhoff-Faris Trust & Sav-*

---

[2] *Sniadach* invalidated Wisconsin's pre-judgment garnishment statute, under which a summons for the seizure of a defendant debtor's wages was issued by a court based solely on the statements of the creditor's attorney. Any subsequently withheld wages could be regained after a later trial on the merits. The court held that the interim deprivation of wages imposed "tremendous hardship" and could not be imposed without a prior hearing. The requirement is even more imperative when the loss is not temporary, as in *Sniadach*, but permanent and total deprivation of one's dwelling and the pain and suffering caused a family suddenly evicted from its living quarters.

ings Co. v. *Hill,* 281 U. S. 673, 682 (1930). See also *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306 (1950), and *Covey* v. *Somers,* 351 U. S. 141 (1956). A nominal opportunity to pursue one's rights can never satisfy the due process clause. And a hearing is nominal when, no matter how just its procedures, one is barred from it by a financial requirement he cannot fulfill. A right which is conditioned upon a circumstance a party cannot meet is in effect no right at all. "Constitutional rights would be of little value if they could be . . . indirectly denied, *Smith* v. *Allwright,* 321 U. S. 649, 664 (1944) . . . or manipulated out of existence." *Harman* v. *Forssenius,* 380 U. S. 528, 540 (1965). See also *Western Union Tele. Co.* v. *Kansas,* 216 U. S. 1 (1909); and *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943). And particularly invidious are those conditions which are based upon race or class, factors which are fixed beyond the ability of the individual to alter. *Morey* v. *Doud,* 354 U. S. 457 (1957).

As one commentator has written about the very statute at issue in *Sanks* v. *Georgia*:

> "There can be no question that the statute does provide for a hearing on the merits. In this sense, it might be said that a tenant need only avail himself of the opportunity that is provided. But it accomplishes nothing to tell a poor man that he would have an opportunity to defend if he had money. Such an opportunity is meaningless to him. He no more has a practical opportunity to be heard than does a defendant who is not given adequate notice."
>
> Klevens, "Poverty and Equal Access to the Courts: the Constitutionality of Summary Dispossess in Georgia." 20 Stanford L. Rev. 766, 772 (1968).

The Georgia requirement of posting bond in order to defend an action is, in effect, a requirement that the indigent tenant fulfill an impossible condition before he will be afforded his fundamental right to be heard. Since the indigent tenant cannot afford to post the bond, he is being deprived of his absolute right to a trial as guaranteed by the due process clause of the Fourteenth Amendment. The impact of this requirement is made shockingly clear when one considers that only thirteen tenants took advantage of their "opportunity to be heard" in response to 19,000 eviction notices issued in Fulton County, Georgia in 1967. (Opinion below in No. 266, Georgia Civil Court, Fulton County, October 2, 1968.)

Under the Georgia procedure, it is possible and even likely that poor tenants will be evicted without good cause. Suppose a tenant with a month-to-month or year lease diligently pays his rent on time. A landlord may want a tenant to vacate before his lease is up because he wants the building for a higher paying commercial tenant, because he just bought the building and does not want tenants of certain race or religion, or because he has a personal grudge against the tenant, perhaps for reporting a housing code violation. See *Edwards* v. *Habib,* 397 F. 2d 687 (1968). Knowing that the tenant has no means of providing the required bond, the landlord can file a complaint for eviction and falsely allege that the tenant has failed to pay rent. The tenant who has paid the rent and has receipts to prove it, nevertheless will be evicted, for without the money to provide the bond he cannot demonstrate his innocence at a hearing. As the tenant has no procedural rights, he also has no substantive rights, in spite of what the law may have led him to believe.

Equally in *Boddie* v. *Connecticut*, No. 265, though the opportunity exists for persons in appellants' marital circumstances to obtain a hearing for an adjudication of divorce, that opportunity is non-existent and unreal to persons who, like appellants, are unable to pay what amounts to an entrance fee.

Nor is the situation substantially different *vis-a-vis* due process in No. 81, *Simmons* v. *West Haven Housing Authority*, in which indigent defendants are deprived of their right to a hearing on appeal. For the appeal has become an "integral part" of our judicial system, *Griffin* v. *Illinois*, 351 U. S. 12 (1956), and "the proceedings in the appellate tribunal are to be regarded as a part of the process of law . . . and to be considered in determining any question of alleged deprivation of . . . life or liberty contrary to the Fourteenth Amendment." *Frank* v. *Mangum*, 237 U. S. 309, 327 (1914). In judging the quality of justice afforded by a particular state system, one must look to the entire course of proceedings in all its courts, *Id.* at 328.

Though the state need not provide any appellate review, when it does so it must afford that review to all commensurate with full constitutional guarantees. *Griffin* v. *Illinois*, 351 U. S. 12 (1956), *Burns* v. *Ohio*, 360 U. S. 252 (1959), *Smith* v. *Bennett*, 365 U. S. 708 (1961); *Lane* v. *Brown*, 372 U. S. 477 (1963). *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966). Thus this Court has invalidated various states' attempts to eliminate appeals by indigents through sorting out processes which fall short of a fair judicial determination of the merits of the appeal. *Anders* v. *California*, 386 U. S. 738 (1967) (appointed counsel refused to prosecute an appeal he determined had no merit); *Lane* v. *Brown*, *supra* (only public defender could obtain a free transcript

on appeal, and he could refuse to do so for an appeal he deemed without merit); *Draper* v. *Washington*, 372 U. S. 487 (1963) and *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U. S. 214 (1958) (trial judge could prevent appeals by indigents when he determined their objections to the trial to be without merit).

The requirement of a hearing attaches whenever important rights may be limited by the state. The power of the courts does not cease after trial; judicial mandate is equally powerful upon appeal, and so that mandate must, commensurate with due process, issue only upon opportunity to all for a full hearing.

B. *The Financial Requirements Challenged by Appellants Herein Are an Arbitrary and Unreasonable Restriction Upon the Judicial Process.*

There is a further dimension to the due process clause which requires administration of a judicial system in an even-handed manner, free from the arbitrary or capricious exercise of state power. *Jones* v. *Union Guano Co.*, 264 U. S. 171 (1924); *Ownbey* v. *Morgan*, 256 U. S. 94 (1921). In fact, the requirement of a hearing before adjudication of criminal or civil rights and liabilities is simply instrumental and subordinate to the underlying mandate of the Due Process Clause, that:

> "... no State can deprive particular persons, or classes of persons, of equal and impartial justice under law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the Constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual

to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice." *Leeper* v. *Texas*, 139 U. S. 462, 468 (1890).

A judicial system which subjects litigants to different treatment based on financial means is indeed subjecting certain of those who come before it "to the arbitrary exercise of the powers of government." By denying to those who cannot afford a surety bond a chance to defend against eviction, at trial or on appeal, or denying the opportunity to file a petition for divorce to those unable to pay the necessary costs, a state is doling out justice on an arbitrary basis, for there is no rational justification in terms of the goals of a judicial system which can justify such distinctions.

This is not to say that all those guarantees which lie within the range of the Equal Protection Clause are simply a reiteration of what is meant by due process of law. It is simply to recognize a minimum requirement of equal justice that is imposed on state judicial systems. *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954); *Giozza* v. *Tiernan*, 148 U. S. 657, 662 (1892); *Truax* v. *Corrigan*, 257 U. S. 312, 332 (1921):

"It may be that they [due process and equal protection] overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous . . . The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon

> inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hurtado* v. *California*, 110 U. S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or the legislature may not withhold."

A system which makes determinations as to the merits of a claim before it, not on the basis of a factual situation, but on the basis of an arbitrary factor wholly external to the issues involved and the laws governing the rights of the parties—"the ability to pay costs," see *Griffin* v. *Illinois*, 351 U. S. 12, 17 (1956)—is not providing due process of law.

Nor can a legislature affect the outcome of legal proceedings by imposing irrational burdens upon one party to a lawsuit and not the other. To impose penalties for lack of success which intimidate and effectively deter a party from resorting to the courts, to gain a judgment or to appeal one, is the same as denying access to the courts entirely, *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340 (1913), and no process cannot be due process.

C. *Appellants Are Being Deprived of Rights Under the Due Process Clause.*

All the guarantees embodied in due process attach in the cases at bar because the appellants therein are being deprived of liberty and property by arbitrary processes of government.

Whether a leasehold is conceived of as real or personal property (see generally Powell, The Law of Real Property, Vol. 2, §221, pp. 177-188 (1967), the lessee's interest is a substantial property right. *Waskey* v. *Chambers*, 224 U. S. 564, 565 (1912); *Shelley* v. *Kraemer*, 334 U. S. 1, 10 (1948).

> "Except when he has divested himself of the right to possession, the lessee under a presently existing lease is the owner of a possessory estate and has all the rights which accompany ownership of such an interest. This is true with regard to the lessor as it is with regard to a third person."
>
> American Law of Property, Vol. I, §3.38, p. 252 (1952).

As to the importance of the liberty to marry and divorce, these are fully examined in Point III, B, *infra*. See also *Williams* v. *North Carolina*, 325 U. S. 226, 230 (1944).

Nor can a state deprive a citizen of his right to prosecute or defend an action without due process.

> "[A] vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice." *Pritchard* v. *Norton*, 106 U. S. 124, 132 (1882).

When a state affords the right to a divorce under certain conditions, it cannot deprive certain classes of persons of that right arbitrarily. For a right to a cause of action is protected by due process, *Forbes* v. *Board of Commissioners*, 258 U. S. 338 (1922), particularly when the action involves a subject as important to both the individual and society as marriage and divorce. *Loving* v. *Virginia*, 388 U. S. 1 (1967); *Maynard* v. *Hill*, 125 U. S. 190 (1888).

No less protected is the right to defend one's property against litigious attacks thereon. *Holt* v. *Virginia*, 381 U. S. 131 (1965); *Pritchard* v. *Norton, supra.* The state of Georgia could not enact a statute providing that the fact of payment is no defense to an eviction action based on alleged non-payment. Such a proposition is absurd. Yet this is exactly what Georgia and Connecticut have done by depriving the indigent tenant of a hearing in which he can present his defenses.

III.

Conditioning access to the Courts on posting bond or fees deprives appellants of freedom of expression and association and the right to petition the Government for redress of grievances in violation of the First and Fourteenth Amendments to the United States Constitution.

A. *Access to the Courts Is a Form of Expression and a Means of Petitioning the Government for Redress of Grievances Which Is Protected by the First Amendment.*

That the First and Fourteenth Amendments bar a state from imposing barriers to litigation is made clear by the series of cases decided by this Court involving attempts to inhibit litigation through restriction on members of the bar. The most definitive of these is *NAACP* v. *Button*, 371 U. S. 415 (1962)[3] in which the Court upheld the right of the NAACP to direct litigation and offer the services of and compensation to attorneys for litigating civil rights cases on behalf of Negroes in Virginia, against the state's accusation of barratry and solicitation of legal business.

Button first explicitly recognizes the importance of litigation as a source of political change.

> "In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression." 371 U. S. at 429.

---

[3] See also *Brotherhood of Railway Trainmen* v. *Virginia*, 377 U. S. 1 (1964) and *United Mine Workers of America* v. *Illinois State Bar Association*, 389 U. S. 217 (1967).

Civil rights litigation is only the most prominent example of the use of the courts, particularly by minorities, whether racial or ideological, to gain a voice in governmental decision-making. Those with unpopular political beliefs (*Schenck* v. *United States*, 249 U. S. 47 (1919); *Greene* v. *McElroy*, 360 U. S. 474 (1959); *Baggett* v. *Bullett*, 377 U. S. 360 (1964)); or the esthetically unorthodox (*Jacobellis* v. *Ohio*, 378 U. S. 184 (1964); *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Freedman* v. *Maryland*, 380 U. S. 51 (1965)); or adherents of minority religious sects (*Engel* v. *Vitale*, 370 U. S. 421 (1962); *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105 (1943)); to name just a few, have sought through the judicial system to assert rights and gain protections which they were powerless to assert or enjoy through the ballot box or other means of influencing their government.

In recent years, the poor have with increasing frequency resorted to the courts to gain influence over those political processes from which they are otherwise cut off by the more affluent majority, with some success in their attempts to enforce existing law or to change that law. See, for example, *Shapiro* v. *Thompson*, *supra*; *King* v. *Smith*, 392 U. S. 309 (1968) (invalidating Alabama's refusal of welfare benefits to children whose mother resided with a man not her husband); *Williams* v. *Dandridge*, 297 F. Supp. 450 (D. Md. 1969) (invalidating maximum limit on Aid to Dependent Children grants regardless of family size and need). In other instances, the poor have successfully fought procedural limitations imposed by the judicial system which curtail their substantive rights, just as appellants herein seek to do. Thus exhaustion of administrative remedies has been held not to be required in a federal action under 42 U. S. C. §1938 (*Damico* v. *State of California*, 389 U. S. 416 (1967)). See also *Holmes* v. *New York City Housing*

Authority, 398 F. 2d 262 (2d Cir. 1968); a hearing commensurate with due process must be afforded persons terminated from public assistance (*Kelly* v. *Wyman,* 294 F. Supp. 887 (S. D. N. Y. 1968), probable jurisdiction noted, April 21, 1969, 37 U. S. L. W. 3399 (1969).

Pre-judgment garnishment, a process which greatly facilitated creditor interests and seriously injured poor debtors, was struck down by this Court, *Sniadach* v. *Family Finance Corp.,* —— U. S. ——, 89 S. Ct. 1820 (1969). In the field of landlord and tenant law, too, the poor have secured a measure of relief from arbitrary procedures. *Edwards* v. *Habib,* 397 F. 2d 687 (1968) invalidated retaliatory evictions and permitted a wholly new defense to be raised in summary eviction proceedings.[4] Also noteworthy are *Thorpe* v. *Durham Housing Authority,* 380 U. S. 670 (1967), —— U. S. ——, 37 U. S. L. W. 4068 (1969) dealing with the right to notice and a hearing before eviction from public housing; and various efforts to establish the doctrine of constructive eviction as a defense in actions for rent. *Reste Realty Corp.* v. *Jay M. Cooper* (N. J. Supreme Court No. A-45, March 17, 1969), *Pasqua* v. *DeMarchi* (N. Y. Sup. Ct. App. Div. 4th Dept. January 1969).

And see *Hackin* v. *Arizona,* 389 U. S. 143, 145 (1967) (Douglas dissenting). Cost requirements severely restrict the provision of legal services to the poor, because funds are simply unavailable to defray such expenses, as is indicated in the Appendix hereto.

The judicial system serves as a primary arbiter of disputes, both between private citizens and citizens and the

[4] The plaintiffs in *Edwards* were permitted to pay rent monthly into court, in lieu of a surety bond, in order to appeal an adverse trial court decision. The appeal resulted in the establishment of the doctrine of retaliatory evictions.

state. Men establish governments to provide order, and so governments must provide the mechanisms for the orderly and peaceful redress of grievances. It is precisely these mechanisms which the First Amendment is designed to make available to all citizens. To deny access to the courts to the poor is to relegate a class to the use of force to achieve its needs.

What is more, the fact that a suit may be nominally between private parties should be of no moment, for ostensibly private suits deeply implicate the state. Thus, in a matrimonial action, frequently the proceeding involves only one of the married parties and the state, the other spouse being beyond reach. The eviction proceedings herein challenged of course involve the state, which participated as landlord and evictor, so that one petitions the government for grievances perpetrated by it in the fullest sense. But even if this were not true, even if the landlord had been a private party, the right to petition the government for the redress of grievances would still obtain. It would be idle naivety to pretend that, in the middle of the twentieth century, a conflict between landlord and tenant is a purely private affair. That conflict, symptomatic of the schism between the privileged and the poor, is intimately bound up with state exertions. To deny the poor equal protection because eviction proceedings typically do not involve the government as landlord and so are private conflicts would be to ignore the widely perceived fact that the division between private and public is no longer so clear and to give credence to the charge of judicial complicity in the most oppressive form of establishmentarianism. Rather, it must be clearly held that rich and poor alike are entitled to petition the government for the redress of grievances and to obtain impartial justice.

Moreover, the status of litigation as protected activity is not mitigated when purely private causes of action are asserted. ". . . [T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political." *United Mine Workers of America* v. *Illinois State Bar Association,* 389 U. S. 217, 223 (1967). The right to petition the government includes the right to assert private demands which nevertheless depend for fulfillment on some form of government action, such as property rights or the right to a divorce when certain statutory requirements are met, just as the plaintiffs in the *Railroad Trainmen* and *United Mine Workers* cases were protected in their pursuit of benefits due them under various workmen's compensation laws.

B. *The Imposition of Costs for Divorce Proceedings Inhibits Appellants' Exercise of Their Freedom of Association and Right to Marry and Procreate.*

In addition to inhibiting their right to petition the government for the redress of grievances, costs imposed in divorce proceedings strike at the appellants' First Amendment right to associate in marriage and family, free from arbitrary interference by the state. Marriage and the family are associations protected against the Federal Government by the First and against the states by the Fourteenth Amendment. See, *inter alia, Skinner* v. *Oklahoma, supra, Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965).

Indeed, of the many associations protected by the First Amendment, the family is in some ways the most fundamental. It stands at the very core of that network of associations upon which our pluralist political structure is based. It has long been recognized that the protections of the First Amendment extend far beyond the simple politi-

cal assembly and embrace the whole range of associations forming this network, including schools, churches, and families as well as political parties. Indeed respect for the integrity of the family has long been one of hallmarks of American constitutional democracy, one of the critical factors distinguishing our form of government from totalitarian regimes.

The right to marry and have children is among the "basic civil rights of man . . . fundamental to the very existence and survival of the race." *Skinner* v. *Oklahoma,* 316 U. S. at 541. The state cannot be permitted to condition marital rights on the basis of invidious classifications. *Loving* v. *Virginia,* 388 U. S. 1 (1967); nor regulate in a discriminatory fashion matter traditionally left within the scope of the family association. *Pierce* v. *Society of Sisters, supra; Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Griswold* v. *Connecticut, supra.* Because of the state's historically intimate involvement in the preservation of the stability of the family as an institution, *Maynard* v. *Hill,* 125 U. S. 190 (1888), only the state can grant to appellants herein the freedom from an unsatisfactory and essentially fictional marriage, and the opportunity to enter into a new union. Plaintiffs have no remedy outside of court, and are prevented from ever entering into a marital association in the true sense, or from establishing a home and family in fulfillment of man's most basic instincts. Unable to afford the costs of a divorce, appellants are bound to a union that has for all purposes ceased to exist, a situation which in many cases is the cause of their indigence and public dependence in the first place. The state offers freedom from such a union, but only to those who can pay. Surely, this is not a reasonable regulation of the constitutionally protected freedom of association.

CONCLUSION

The Court should hold the financial requirements at issue in the three cases at bar violative of the Fourteenth Amendment in that they unlawfully discriminate against indigent persons and permit access to the courts and a judicial hearing only to those of financial ability. The decisions below should be reversed.

Respectfully submitted,

PAUL M. DODYK
LUCY V. KATZ
401 West 117th Street
New York, N. Y. 10027

Attorneys for the Center on Social Welfare Policy and Law

KENNETH PHILLIPS
MYRON MOSKOVITZ
PETER HONIGSBERG
Earl Warren Legal Institute
University of California
Berkeley, California 94720

Attorneys for the National Housing Law Project

JOHN DEWITT GREGORY
NAPOLEON B. WILLIAMS
80 William Street
New York, N. Y. 10038

Attorneys for Community Action for Legal Services, Inc.

APPENDIX

APPENDIX

Publicly Funded Programs Providing Legal Services to the Poor Cannot Supply Bonds for Litigation Purposes

At the request of the Center for Social Welfare Policy and Law, Community Action for Legal Services undertook a survey to determine the experiences of the various legal services programs across the country with respect to requirements for posting bonds in civil cases brought on behalf of indigents. Pursuant to this undertaking, approximately thirty legal services programs, representing thirty states, were mailed a form letter and questionnaire (included within this appendix) requesting information in regards to the availability of legal services for the poor in situations requiring the posting of a bond. Insufficient time made it impossible for all but a few programs to respond. Precise statistical tabulation of these responses was impossible. The responses obtained, however, did outline the effects which the bond requirements posed to the successful operation of a legal services program.

Few of the programs actually posted bonds for litigation purposes. Partly, this is so because their programs decided to forego the suit because of the expenses and difficulties involved, and partly because some states have permitted waiver of the requirement. New York Civil Practice Law and Rule, §5519 (a) is illustrative on the latter point. To obtain, upon appeal, a stay of enforcement of a money judgment *without a court order,* the appellant is required to file an undertaking securing the judgment below. However, subsection (c) of Section 5519 allows a litigant an opportunity to obtain a stay by court order. Presumably this is without posting an undertaking, although the statute

is not very clear on this point. That waivers have not been possible in all such cases where states have similar provisions is confirmed by the enclosed statements from legal services attorneys that they have terminated hundreds of cases as a consequence of the bond requirement.

From this limited response, it was quite evident that legal services programs were unable to budget funds for the cost of procuring bonds. This result is in line with the experience in New York City. Funds from the Office of Economic Opportunity simply are not sufficient to pay for bonds. The money for bonds invariably comes from general litigation funds. The availability of money is a very acute problem for the legal services program. The OEO News Summary of the War on Poverty, dated July 15, 1969, states that:

> "Two hundred thirty one *Legal Services Programs* have been helped in fiscal 1968 at a Federal cost of $34,739,443." News Summary, p. 5.

Certainly, thirty five million dollars is a small figure to finance the entire cost of civil litigation for the poor of the nation. If New York City's experience is a guide to the general financial condition of other legal services programs in the country, and we believe that it is, then there is a rather straightforward way to account for the minute sums available for the costs of bonds.

Here as elsewhere, legal services programs are grossly understaffed and, as a direct result of the understaffing, are encountering a severe caseload problem. This strain on manpower increases the need for additional lawyers and clerical workers. In New York City, there are ten legal services programs, operating under Community Action for

Legal Services. Each of these programs has requested additional funds for increases in staff and staff salaries. The pressures on the programs, in terms of the strain of their budgets, can best be seen through the operation of Mobilization for Youth, one of the programs in New York. Mobilization for Youth, or MFY as it is popularly called, employs twenty-one attorneys. These 21 attorneys are responsible for providing legal services to the poor in an area extending from the lower east side of Manhattan, near East 3rd St., to the west side, near W. 102nd St. The use of 21 lawyers to cover such a vast area is conceivable only in a poverty program. Starting salaries for lawyers on the MFY staff are approximately $8600 as compared to starting salaries of $15,000-$18,000 for lawyers in Wall St. law firms. MFY has a proposed budget of $835,690 for 1969-1970, personnel costs, including salaries and fringe benefits, account for $665,025, or approximately 80% of the budget. In the past five months, ending on May, 1969, MFY reported an intake of 2,848 new cases, or an average of 136 new cases per attorney. Of this figure, 1,594 cases were closed or withdrawn, leaving 4,320 cases, or 206 cases per attorney, still pending.

These conditions are representative of the problems faced by legal services programs in the City and in the United States. To permit precious funds to be diverted away from the main goal of obtaining more attorneys in order to meet the costs of posting bonds would be a disservice to the poor who have come to rely upon the legal services attorney.

ALABAMA

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

1. Amount of funds allocated to costs of bonds:

   The CAP Agency has a general fund for numerous purposes out of which they supply us bond money. However, we have no special fund designated specifically for bonds.

2. Amount expended for costs above:

   We have one case dealing with the double-rent bond and unlawful detainer suits and have bonded $624.00; we have appealed the same case on a $100.00 bond.

   In suits for preliminary injunctions, we have thus far spent $1500.00.

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

   The Birmingham Legal Services Program was begun in January, 1969. At the time our budget was drawn, I assume that the necessity of bond money was not foreseen. However, let me clearly point out that the CAP Agency has been most generous with us. The money comes from them and not out of Legal Services budget.

4. Number of cases handled each month requiring a bond:

   In the last six (6) months, we have dealt with four cases requiring a bond.

5. Number of cases terminated because of inability to procure a bond: None.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client.

7. Statement of situations requiring the posting of a bond in your state. (Attached)

   A. Preliminary Injunctions; B. Appeal of unlawful detainer suits from General Sessions to Circuit Court; C. Detinue Suits in order to retain property; D. Appeal bonds in all appeal cases, in the amount guaranteeing the court costs accrued and the estimated court costs in the higher court, as well as guaranteeing the amount of judgment in the lower court.

   (These are the only situations I am familiar with personally.)

Linda S. Lombard
Legal Services Program Ensley Office
Birmingham, Alabama

AFFIDAVIT

It is most disturbing that a tenant can be evicted only five days after judgment is taken in an unlawful detainer suit. This procedure makes it most difficult to contest the filing of the double-rent bond when we wish to appeal the judgment to the Circuit Court. By the time I could get a hearing on a motion to suspend bond, or on a show-cause motion, the tenant would be out in the street.

It has thus far been impossible for me to contest the double-rent bond and the appeal bond required in unlawful detainer (eviction) cases, without detriment to my client.

Linda S. Lombard
Staff Attorney
Ensley Office
Legal Services Program

WITNESS: Virginia Hamilton

ARIZONA

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

1. Amount of funds allocated to costs of bonds:

   None

2. Amount expended for costs above:

   None

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

   No funds allocated under our federal grants for bonds.

4. Number of cases handled each month requiring a bond:

   Approximately 12 per month.

5. Number of cases terminated because of inability to procure a bond:

   Approximately 70 per year.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client:

   It has in some cases. Affidavit attached.

7. Statement of situations requiring the posting of a bond in your state:

The situations most commonly affecting clients of the Maricopa County Legal Aid Society, Phoenix, Arizona, are, in the order of importance and frequency:

(1) Bond required to appeal a judgment from the Justice of the Peace Court to the Superior Court for trial de novo.

(2) Various appeal bonds.

Russell G. Sheley, Jr.
Maricopa County Legal Aid Society
Phoenix, Arizona

AFFIDAVIT

STATE OF ARIZONA,
COUNTY OF MARICOPA, *ss.*:

RUSSELL G. SHELEY, JR., Senior Staff Attorney, Maricopa County Legal Aid Society, Phoenix, Arizona, upon his oath deposes and says:

Based upon his personal experience, and upon information from other attorneys of this organization, which information he deems reliable, the necessity of posting bonds and the financial inability of a client to do so, sometimes prevents effective representation of the client.

RUSSELL G. SHELEY, JR.

SUBSCRIBED AND SWORN to before me this 2nd day of July, 1969.

Conception C. Padilla
Notary Public

My Commission Expires:

August 25, 1972

COLORADO

STATEMENT CONCERNING THE POSTING OF BONDS FOR STAYS, APPEALS, VACATING OF JUDGMENTS AND PROVISIONAL REMEDIES

1. Amount of funds allocated to costs of bonds:

Our office has no specific fund set aside for the cost of posting bonds. Our grant only allows a general litigation fund out of which we must provide for depositions, court costs when we cannot get through a motion to sue in forma pauperis (filing fees, jury fees, subpoena fees, etc.) and the client really cannot afford these costs.

2. Amount expended for costs above:

Only about $50, to $100. because cannot deplete the fund for the many other litigation costs which must be met.

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

Very simply stated, the budget grants are not adequate.

4. Number of cases handled each month requiring a bond:

We cannot answer this question accurately. In the last month we have handled ten eviction cases by filing very elaborate pleadings. Upon the filing of our answers, the opposing parties have made offers which upon communication to our clients, the clients have found attractive and settled.

5. Number of cases terminated because of inability to procure a bond:

Again, this number is not ascertainable. If the bond requirement was not there, perhaps our clients would not find the settlement offers so attractive. Landlord-tenant law in Colorado is medieval in character. Our legislative efforts this year met much opposition and the bill was killed. Consequently judge-made law is the only avenue at present; but the cases slip from us because of the practical judgments our clients find it necessary to make.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client.

7. Statement of situations requiring the posting of a bond in your state.

In Colorado "evictions" are commenced judicially pursuant to CRS (1963) 58-1-10. There is no posting of a bond pre-condition necessary for either party at trial. There are requirements of notice. CRS (1963) 58-1-7 described that notice in writing within fixed time periods according to the nature of the tenancy is necessary. This is for termination other than for non-payment of rent. Evictions for non-payment of rent are processed pursuant to CRS (1963) 58-1-8. Jurisdiction of the Courts is described in CRS (1963) 58-1-9, revision in Vol. 9 of CRS.

In Colorado, however, CRS (1963) 58-1-4 does provide that if either party requests a delay in trial longer than five days, it is within the discretion of the court upon good cause shown to require the posting of bond.

On appeal, CRS (L. 64) 58-1-18 requires the posting of a bond for all costs and damages which may accrue to the adverse party in order to stay proceedings on the judgment more than forty-eight hours. In addition, CRS (L. 64) 58-1-19 requires the defendant to deposit with the court the amount of rent found due and specified in the judgment in order to pursue his appeal.

AFFIDAVIT

STATE OF COLORADO,
CITY AND COUNTY OF DENVER, *ss.*:

TO WHOM IT MAY CONCERN:

I, RICHARD F. HENNESSEY, having been duly sworn, depose and say that:

1. I received a Doctor of Jurisprudence Degree from the Notre Dame Law School, University of Notre Dame, Notre Dame, Indiana, and thereafter received a Reginald Heber Smith Community Lawyer Fellowship from the University of Pennsylvania Law School for the purpose of study of the legal problems of the poor and engaging in legal services to the poor and disadvantaged.

2. I am a member of the Bar of the State of Colorado and have been an attorney for the Legal Aid Society of Metropolitan Denver, 1375 Delaware Street, Denver, Colorado 80204, for one year. During this time, I have been working solely with providing legal counsel and representation to persons who qualify for legal services and who are therefore, by definition, destitute.

3. In Colorado, C.R.S. (1963) 58-1-4 provides that if either party to a suit for unlawful possession of land requests a delay in trial longer than five days after the answer is due (which is five days after service of summons and complaint), it is within the discretion of the court upon good cause shown to require the posting of bond. On appeal, C.R.S. (L. '64) 58-1-18 requires the posting of a bond for all costs and damages which *may* accrue to the adverse party in order to stay proceedings on the judgment more than forty-eight hours. In addition, C.R.S. (L. '64) 58-1-19 requires the defendant to deposit with the court the amount of rent found due and specified in the judgment in order to pursue his appeal.

4. I have represented numerous persons, who, because of their poverty, were not able to plan for, in pursuing their judicial claims, the posting of bond in cases covered by the statutes mentioned in paragraph 3 above.

5. The Legal Aid Society of Metropolitan Denver does not have funds available for the posting of such bonds.

6. Due to these requirements of posting bond, I have not been able to give effective legal counsel and representation to my clients in diligently pursuing claims which are meritorious and just.

RICHARD F. HENNESSEY

Subscribed and sworn to before me this 26th day of June, 1969.

Merlyn H. Kinchelow
Notary Public

My commission expires
November 17, 1971

INDIANA

STATEMENT CONCERNING THE POSTING OF BONDS FOR STAYS, APPEALS, VACATING OF JUDGMENTS AND PROVISIONAL REMEDIES

1. Amount of funds allocated to costs of bonds:

Approximately $500.00 is allocated for litigation expenses of which bonds are included.

2. Amount expended for costs above:

Approximately $100.00 per year.

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

More funds are not budgeted for the cost of bonds because the O.E.O. has not increased our budget to allow for litigation cost.

4. Number of cases handled each month requiring a bond:

Approximately 15 cases each month require a bond.

5. Number of cases terminated because of inability to procure a bond:

Almost every case that requires a bond is terminated due to the inability to procure a bond.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client.

7. Statement of situations requiring the posting of a bond in your state:

Briefly they are as follows:

a. In an eviction action, if the plaintiff files an affidavit for immediate possession and a writ for possession the defendant is required to post a bond under Burns Indiana Statutes Annotated 3-1306. The tenant failing to post a bond will be evicted.

b. A bond is required before a court enters a temporary restraining order on temporary injunction pursuant to Burns Indiana Statute 3-2107.

c. A bond is not required to file an appeal, however, a bond is required in order to stay the enforcement of any judgment or interlocutory order, Supreme Court Rule 2-3.

All of the above bonds are required and if a waiver is not granted under the statute or rules of the Indiana Supreme Court.

AFFIDAVIT

STATE OF INDIANA)
COUNTY OF LAKE)

I, J. ROBERT MIERTSCHIN, JR., first being duly sworn under oath depose and say:

1. That I am an attorney for the Legal Aid Society of Gary, Inc., Gary, Indiana.

2. That the requirements of posting bonds has been a detriment to our clients.

3. That Legal Aid cliental do not have the funds to provide for a bond and are thereby prohibited effective representation and immediate relief.

Affiant, verily believes that the foregoing is true and accurate to the best of his knowledge.

J. Robert Miertschin, Jr.
Legal Aid Society of Gary, Inc.
738 Broadway, Gary, Indiana

Subscribed and sworn to before this ..... day of July, 1969.

Nancy Marie McQuen
Notary Public

My Commission Expires:

August 22, 1972

IOWA

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

1. Amount of funds allocated to costs of bonds:

   $2,000 lump sum for all litigation costs.

2. Amount expended for costs above:

   100%.

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

   Total budget is too small to increase this cost.

4. Number of cases handled each month requiring a bond:

   6-7 per year.

5. Number of cases terminated because of inability to procure a bond:

   We have no figures on this, would guess several per year.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client:

   No Affidavit.

7. Statement of situations requiring the posting of a bond in your state:

   Replevin; Appeal from Summary Eviction.

Duane E. Woodworth, Director
Black Hawk County Legal Aid Society
Waterloo, Iowa

LOUISIANA

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

1. Amount of funds allocated to costs of bonds:

   $5,000 for court costs. There is no breakdown of types of court costs, such as bankruptcy fees, divorce fees, etc.

2. Amount expended for costs above:

   None

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

   O.E.O. restrictions and needs in other areas for more funds.

4. Number of cases handled each month requiring a bond:

   None

5. Number of cases terminated because of inability to procure a bond:

   Unknown—neighborhood attorneys take position that procedures on appeal, particularly bond requirements, are so onerous that appeals are, as a practical matter, nonexistent.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client:

   See attached.

7. Statement of situations requiring the posting of a bond in your state:

See attached memorandum. Memorandum is written as an advocate's presentation. The arguments put forth have never been successfully raised in Louisiana.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, a Notary, appeared the undersigned, JEFFREY B. SCHWARTZ, who declared under oath that:

1. I am a staff attorney with the New Orleans Legal Assistance Corporation, an OEO-funded legal services office rendering free legal advice and services to the poor.

2. The New Orleans Legal Assistance Corporation (NOLAC) has five neighborhood offices and one main office with a complement of nine full time attorneys.

3. NOLAC accepts on the average about sixty or seventy cases a year involving evictions by a landlord of a tenant-client.

4. Although the records of NOLAC do not reveal how many of these cases were actually defended by NOLAC attorneys in summary state eviction proceedings, personal familiarity with these cases leads to an estimate that a large portion of the sixty or seventy cases did involve attempted defenses, a high proportion being unsuccessful, in state court.

5. NOLAC attorneys have *never* appealed a judgment of eviction by the City Court.

6. The reason for failure to appeal in any case, even though in some instances the attorney does believe that there is cause for a reversal of the lower court decision of eviction, is the onerous requirements for taking an appeal.

7. Primary among these onerous requirements for the indigent clients of NOLAC is the requirement that the tenant-appellant post security in sufficient amount to protect the landlord against all damages the landlord may sustain as a result of the appeal. LSA-C.C.P. Art. 4735. Being indigent, NOLAC's clients are unable to post the security for damage and consequently, are effectively prohibited from appealing a decision of eviction.

JEFFREY B. SCHWARTZ
New Orleans Legal Assistance Corp.
605 Carondelet Building
New Orleans, Louisiana

Sworn to and subscribed before me
this 23rd day of July 1969.

EARL J. AMEDEE
Notary Public

NEW ORLEANS LEGAL ASSISTANCE
CORPORATION
605 Carondelet Building
New Orleans, La. 70130

MEMORANDUM

Reform in the area of landlord-tenant relations is going to require defense at the trial level and appeals if necessary. In the event of an order to vacate, the initial concern must be to maintain the client in possession. Once the tenant vacates the premises, the question of his *right* to possession of the premises becomes moot. (Of course, the client's leaving the premises does not affect any affirmative actions for damages such as a suit in tort.)

In an eviction suit, the procedures to obtain a suspensive appeal are onerous and must be carefully complied with. LSA-C.C.P. Art. 4735. The necessary procedures are:

1. A sworn answer by the defendant to the rule;

2. The pleading in the answer of an affirmative defense entitling defendant to retain possession of the premises; and

3. Within 24 hours after the rendition of the judgment of eviction,

   (a) Apply for the appeal

   (b) File appeal bonds.

Although cumbersome and sticky, the only one of these requirements that presents a substantial burden, is the furnishing of an appeal bond. Article 4735 provides,

"The amount of the suspensive appeal bond shall be determined by the court in an amount sufficient to protect the appellee against all such damages as he may sustain as a result of the appeal."

The possible damages sustainable as a result of the appeal are as follows:

1. Loss of use of premises from date of judgment by trial court until date of final appellate judgment by the appellate court.

2. Cost of the appeal.

Considering the second point as to the cost of appeal first, it is clear that a person entitled to proceed in forma pauperis under Article 5185 is entitled to a devolutive appeal and to apply for supervisory writs without cost. LSA-C.C.P. 5185. Article 5185 goes on to state, however, that such an indigent

"is not entitled to a suspensive appeal, or to an order or judgment required by law to be conditioned on his furnishing security other than for costs, unless he furnishes the necessary security therefor."

The case law makes it clear that the portion of a bond relating to the costs of the appeal as opposed to security for damages is not required of an indigent. See comment (f) to Article 2124 and cases cited therein. Thus, our clients do not have to file bond to cover the costs of an appeal.

The remaining point as to a bond for damages suffered during the pendency of the appeal is more difficult to deal with. Article 2124 states the security be furnished for an appeal. The security to be furnished for a suspensive appeal is as follows:

"(1) * * *;

(2) when the judgment distributes a fund in custodia legis, only security sufficient to secure the payment of costs is required; and

(3) in all other cases, the security shall be fixed by the trial court at an amount sufficient to assure the satisfaction of the judgment, together with damages for the delay resulting from the suspension of the execution."

Since the judgment is possession of the premises, there appears to be no danger that if the appeal is unsuccessful, the premises will not be delivered. The only damage, therefore, is due to the delay. This will probably be measured by the monthly rent being paid, though allegations of additional damage might be encountered.

The most desirable procedure from our client's point of view, if this becomes the ultimate issue in controversy as to the appeal bond, is to pay the monthly rental periodically into court as it accrues. This arrangement has the advantage of leverage on the lessor to appeal and to pursue the matter without delay yet still affords him opportunity to seek dissolution of suspensive appeal should lessee fail to pay. The order for a suspensive appeal could be so framed.

It should be noted in making the argument that periodic payment in court of the accrued rent is sufficient, that comment (c) to Article 2124 states that,

"Subparagraph 3 . . . is taken in principal from Fed. Rule 73(d). It is flexible in that it gives the court a wide discretion in fixing the bond in cases not involving a money judgment."

Another argument, that is appealing to me, (for saying) that no suspensive appeal bond is appropriate is that the periodic payment of the accrued rent into court constitutes, under subparagraph 2 above, a custodia legis. Therefore, under the prevailing law no appeal bond for damages is necessary. See paragraph (f) of comments to Article 2124.

It should be argued, that the requirement of any appeal bond beyond the periodic payment into court of the accrued rent is in violation of both State Constitution, Article I, §§2&6, (due process and open access) and the United States Constitution, the Equal Protection Clause provision of the Fourteenth Amendment because the security effectively bars indigents from appealing. *Griffin* v. *Illinois; Williams* v. *Shaffer* (Douglas dissenting).

MAINE

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

Pine Tree Legal Assistance, Inc. has no specific moneys allocated for the cost of bonds but pays for those few bonds which we do file from our general court cost fund. As far as I know we have handled very few cases requiring the posting of a bond and have terminated none because of inability to procure a bond.

Me. Rev. Stat. Ann. tit. 14, §1903 (1964) requires the posting of a bond upon an appeal taken from the District Court if the appellee so requests. However, there is no bond required for appeal to the Law Court, the highest court in Maine, from the Superior Court which is the higher of the two trial courts in the State. Me. R. Civ.

P. 62 e. However, the civil rule for the issuance for a restraining order or preliminary injunction requires the giving of security by the applicant therefore. Me. R. Civ. P. 65 c.

I hope this will be sufficient for your purposes, and we are, of course, hoping that there will be a favorable decision in the Simmons case. It would be much appreciated if you could forward to us a copy of the amicus brief which you will file in that case.

July 8, 1969

Robert Edmont Mittel
Director Test Case Unit
Pine Tree Legal Assistance, Inc.
Portland, Maine

MICHIGAN

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

1. Amount of funds allocated to costs of bonds:

   None

2. Amount expended for costs above:

   None

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

   No provision in our funding for bonds.

4. Number of cases handled each month requiring a bond:

   15

5. Number of cases terminated because of inability to procure a bond:

   35 to date this year.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client:

   See attached.

7. Statement of situations requiring the posting of a bond in your state:

   All of the 35 cases dropped before appeal for lack of bond were appeals from landlord-tenant court, where waiver was requested and denied, and offers to pay current rentals were refused as bond. Michigan law formerly required the posting of 9 months rent as bond on *appeal.* New statute effective October, 1968 changed that requirement to reasonable bond. M.S.A. §27A.5670 Landlord-tenant division judges have consistently construed this to require a cash deposit in the amount of the judgment below or more in spite of Common Pleas instructions reiterating the statutory language. Circuit court judges usually on appeal will accept paying of current rentals into court as proper bond.

INHIBITION ON JURY TRIAL

In Revised Rules of the Common Pleas Court of Detroit, Landlord-Tenant Division, effective May 15, 1969,

a tenant must pay current rentals into escrow if he demands a jury trial and if said trial cannot be held "forthwith." Rule 7. This court-rule imposed escrow provision operates as a bond to secure the landlord's claim for rent before a tenant may obtain a jury trial. In spite of Common Pleas instructions to the contrary, Landlord-Tenant Division judges construe "current" rentals to be all rent claimed.

AFFIDAVIT

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

MAX L. HARDEMAN, being duly sworn deposes and says that for the past year he has served as rent strike Coordinator for Neighborhood Legal Services in Detroit, Michigan.

Deponent says further that there is a bond requirement for appealing judgments from our local "eviction court" (Landlord-Tenant Court).

Deponent says further that even when the bond requirement has been met that clerks of the "Local eviction court" have refused to file the bond.

Deponent says further that the bond may be satisfied by securing sureties. That when personal sureties are obtained it is necessary for them to take an oath before a judge of that Court. That deponent has been informed and believes that the judges of that Court have refused to administer said oath when personal sureties have appeared before them and requested it.

Deponent says further that many of these defendants receive no notice of the Court proceedings until they are over.

Deponent says further that the necessity for posting bonds coupled with the lack of notice of the Court proceedings prevents many defendants from ever having a day in Court.

Further deponent saith not.

MAX L. HARDEMAN

Dated: July 25, 1969

Subscribed and sworn to before me
this 25th day of July, 1969.

LORAL D. VIGLIOTTI, Notary Public
County of Wayne, State of Michigan
My Commission Expires: Dec. 9, 1972

MISSISSIPPI

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

Few of our clients pay rent, and evictions in rural areas are not frequent; so it is hard to draw any conclusions.

M. B. Trister
North Mississippi Rural Legal Services
Oxford, Mississippi

NORTH CAROLINA

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

Letter July 4, 1969:

In answer to your letter of June 19, 1969, we regret to report that our Housing Division, as such, is only a few weeks old and we have done no trial work in this area as of this time. However, we are working on such a case and obtained a brief used by the Legal Aid office in Charlotte, North Carolina, to further our efforts. I thought you might be interested in seeing the part of the brief dealing with the constitutionality of our bond statute, NCGS §42-34. If someone could benefit from this, please pass it along.

In order to appeal from a summary ejectment, NCGS requires that:

> "... but no execution commanding the removal of a defendant from the possession of the demised premises shall be suspended until the defendant gives an under-

taking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be approved by the justice, to be void if the defendant pays any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land."

At present this statute is still valid as it has not gone to the North Carolina Supreme Court. There was no appeal in the *Lessie Mae Tucker* v. *Bumgardner* case.

I hope this information will be of some value to you.

Bill Marshall
Housing Division
The Legal Aid Society of Forsyth County
Winston-Salem, North Carolina

TEXAS

STATEMENT CONCERNING THE POSTING OF BONDS FOR STAYS, APPEALS, VACATING OF JUDGMENTS AND PROVISIONAL REMEDIES

1. Amount of funds allocated to costs of bonds:

   None.

2. Amount expended for costs above:

   N/A

3. Short statement explaining why more funds are not budgeted for the costs of bonds:

   N/A

4. Number of cases handled each month requiring a bond:

   One or two.

5. Number of cases terminated because of inability to procure a bond:

   None.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client:

   N/A

7. Statement of situations requiring the posting of a bond in your state.

   Can usually be waived if it is a problem.

Frank P. Christian, Director
Bexar County Legal Aid Association
San Antonio, Texas

FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 24 1969
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~865~~ 27

GLADYS BODDIE, ET AL
Appellants,

v.

THE STATE OF CONNECTICUT, ET AL
Appellees.

On Appeal from the United States District Court Of The District of Connecticut

---

BRIEF FOR APPELLEES

ROBERT K. KILLIAN
Attorney General

RAYMOND J. CANNON
Assistant Attorney General

30 Trinity Street
Hartford, Connecticut 06115

Of Counsel:

WILLIAM S. KAPLAN

30 Trinity Street
Hartford, Connecticut 06115

INDEX

SUBJECT INDEX

Page

Table of Authorities iii

Statement of The Case 1

Summary of Argument 2

Argument

I. Regulation Of Entry Fees For The Connecticut Superior Court Is Within The Exclusive Domain Of The Connecticut Legislature. 4

A. Courts cannot overturn legislation merely because it is harsh, unwise, or they would have done it another way. 4

B. The development of an in forma pauperis statute necessarily requires the use of skills more appropriate to the legislative function of government. 6

C. Connecticut is experimenting with innovative concepts as it develops in forma pauperis procedures. 8

II. The Griffin Doctrine Should Be Limited To Cases Concerning The Personal Liberty Of An Accused. 10

A. There is no legal precedent to extend the Griffin Doctrine to civil litigation. 10

B. Divorce is not a right of sufficient magnitude to qualify for relief on the extraordinary grounds of the Griffin Doctrine. 11

C. The Griffin Doctrine is only justified in a criminal type proceeding where the state is an actual participant having an adversary interest. 13

III. The Prepayment Of Court Entry Fees Required By Connecticut General Statutes Sec. 52-259 Is A Constitutional Exercise Of Sovereign Power. 14

A. The entry fees are reasonably related to legitimate state interests. 14

IV. The Court Should Maintain The Traditional Concept That Civil Litigants Are Responsible For The Costs Incidental To Bringing A Legal Action. 16

A. Connecticut courts cannot waive payment of costs. 17

B. One sues in forma pauperis as a matter of privilege. 17

V. The Due Process Clause Of The Fourteenth Amendment To The United States Constitution Only Protects Rights That Are Constitutionally Guaranteed. 21

A. Divorce is not a constitutionally guaranteed right. 21

Conclusion 22

Exhibit A 25

Exhibit B 27

Exhibit C 28

TABLE OF AUTHORITIES

Cases: *Page*

Boddie v. *Connecticut*, 286 F. Supp. 968 (D. Conn. 1968) 7, 8, 14, 15

Boddie v. *Connecticut*, 286 F. Supp. 968 (D. Conn. 1968) 7

Bolling v. *Sharpe*, 347 U.S. 497 (1954) 22

Bowman v. *White*, 388 F. 2d 756 (4th Cir. 1968) 17

Brotherhood of Railroad Trainmen v. *Virginia*, 377 U.S. 1 (1964) 21, 22

Burns v. *Ohio*, 360 U.S. 252 (1959) 11

Button v. *NAACP*, 371 U.S. 415 (1963) 21, 22

Carrington v. *Rash*, 380 U.S. 89 (1965) 16

Casale v. *Casale*, 138 Conn. 490 (1952) 11, 12

Daniel v. *Daniel*, 116 Wash. 82 (1921) 17

Dattilo, In re Appeal of, 135 Conn. 431 (1965) 17

Dellaripa's Appeal, 88 Conn. 565 (1914) 20

Ferguson v. *Skrupa*, 372 U.S. 726 (1963) 5

Frederick v. *Schwartz*, 296 F. Supp. 1321 (D. Conn. 1969) 9

Griffin v. *Illinois*, 351 U.S. 12 (1956) 10, 13, 14, 15

Harper v. *Virginia Board of Elections*, 383 U.S. 663 (1966) 5, 16

Hernandez v. *Texas*, 347 U.S. 475 (1954) 16

Jefferies v. *Jefferies*, 296 N.Y.S. 2d 74 (Sup. Ct., Kings Cty. 1968) 7, 10, 19, 20, 21

Lane v. *Brown*, 372 U.S. 477 (1962) 11

Long v. *District Court of Iowa*, 385 U.S. 192 (1966) 11

Loving v. *Virginia*, 388 U.S. 1 (1967) 12

Marquardt v. *Fisher*, 135 Ore. 256 (1931) 17

McLaughlin v. *Florida*, 379 U.S. 184 (1964) 16

Nelson v. *City of New York*, 352 U.S. 103 (1956) 6

Patterson v. *Dempsey*, 152 Conn. 431 (1965) 22

Rapid Transit Corp. v. *City of New York*, 303 U.S. 573 (1938) 14, 15, 16

Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 16

Shapiro v. *Thompson*, ____ U.S. ____, 89 S. Ct. 1322 (1969) 16

Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 12

Smith v. *Bennett*, 365 U.S. 708 (1961) 11

Smith v. *Firestone Tire and Rubber Co.*, 255 F. Supp. 905 (E.D. Penn. 1966) 17, 18

Steele v. *Steele*, 35 Conn. 48 (1868) 21

United Mine Workers v. *Illinois Bar Assoc.*, 389 U.S. 217 (1967) 21, 22

U. S. v. *Madden*, 352 F. 2d 795 (9th Cir. 1965) 17

Williams v. *Shaffer*, 385 U.S. 1037 (1967) 11

Wilmot v. *City of South Bend*, 221 Ind. 538 (1943) 16

Constitutional Provisions:

Fourteenth Amendment to the United States Constitution 10, 21

Statutes:

Federal

28 U.S.C.A. § 1915 ..... 7, 18

State

Conn. Gen. Stat. § 46-1 12

Conn. Gen. Stat. § 46-10 7

Conn. Gen. Stat. § 52-259 ..... 3, 10, 14, 21, 22

Conn. Special Act No. 272 (1967) 9

Other Authorities:

44 C.J.S. Insane Persons § 71 12

55 C.J.S. Marriages § 16 12

In the

Supreme Court of the United States

October Term, 1969

No. 265

GLADYS BODDIE, ET AL
Appellants,

v.

THE STATE OF CONNECTICUT, ET AL
Appellees.

On Appeal from the United States District Court
Of The District of Connecticut

BRIEF OF APPELLEES

STATEMENT OF THE CASE

Appellants are welfare recipients who wish to divorce their husbands.* To prosecute a divorce case in Connecticut one must pay a Superior Court entry fee of forty-five dollars, after having process served by a sheriff at an average cost of fifteen dollars. If newspaper publication is necessary, the aggregate expense could exceed one hundred dollars. Appellants claim they cannot afford these costs.

Appellants attempted prior to service to file divorce complaints in the Superior Court of New Haven, Connecticut on

*Since this case is being heard on appeal from the granting of a motion to dismiss, the following allegations of fact from the Complaint are presumed to be correct.

March 13, 1968 (A. 8-10). In lieu of the required fees, appellants attached financial affidavits (A. 11-28) with a request that the fees be waived and that the court effect service.

On March 14, 1968 Court Clerk Edward Horwitz returned all the papers without filing because they were not accompanied by the statutory fees. On April 2, 1968 Superior Court Judge Joseph S. Longo refused to hear Appellants' motion to waive costs and effect service of process because he had no statutory authority to grant such relief. On the same day, Connecticut Court Administrator, Justice John P. Cotter took the same position.

Appellants then brought a civil rights action in the United States District Court for the District of Connecticut where they requested declaratory and injunctive relief from a three-judge court. Appellants claimed that the Connecticut entry fee statute was unconstitutional as it applied to them and asked the court to order Appellees to accept divorce papers without the payment of entry fees and to effect service of process.

Appellees filed a motion to dismiss which the court granted on July 17, 1968 because it felt a legislature should provide the requested relief. Appellants took an appeal to this court.

SUMMARY OF ARGUMENT

Appellants have requested this court to write an in forma pauperis statute for the State of Connecticut. But, essential to our democracy is a tripartite system of government where no branch interferes with the activities of another. The Connecticut Legislature has the exclusive responsibility of regulating the fee structure for Connecticut courts. The legislature is best equipped to answer questions about socio-economic factors. The information so derived must neces-

sarily support any effective social legislation. Connecticut has begun the task. Even today it is experimenting with innovative concepts such as a legal services demonstration project to aid in selecting the best way to provide legal services for the poor.

Appellants are not now incarcerated. Conn. Gen. Stat. Sec. 52-259 does not intentionally discriminate. A state's forbearance from unintentional discrimination has never been required by this court, except in cases involving the personal liberty of an accused. This Griffin Doctrine should not be extended to include divorce since divorce does not have sufficient weight on the scale of justice. In addition, the Griffin Doctrine should be limited to cases where the state is a participating adversary.

In the last reported year, one and one-half million dollars were received by the Connecticut courts as entry fees. At least ten per cent of the judicial budget was paid by those who directly benefited from the use of the courts — hardly a unique concept. The imposition of entry fees reduces the amount of frivolous litigation. Therefore, these statutory fees are reasonably related to legitimate state interests. No other standard is applicable.

There is no inherent right to avoid payment of court costs for civil litigation. On its own initiative, a Connecticut court cannot waive payment of these fees — a waiver can only be achieved by statute. Even in jurisdictions with statutory in forma pauperis procedures, one proceeds as a matter of privilege. Appellants request not only that this privilege be converted to a constitutional right but also that such right must include arrangements for the payment of auxiliary expenses. The proposition has neither precedent nor merit.

Divorce is a statutory right which the state is not re-

quired to provide. Due process can only protect constitutionally guaranteed rights.

The court should affirm the decision of the District Court which granted appellee's motion to dismiss.

I.

REGULATION OF ENTRY FEES FOR THE CONNECTICUT SUPERIOR COURT IS WITHIN THE EXCLUSIVE DOMAIN OF THE CONNECTICUT LEGISLATURE.

A. Courts cannot overturn legislation merely because it is harsh, unwise, or they would have done it another way.

Appellants have requested this court to discard the system of court procedures enacted by the Connecticut legislature and to replace it with a court made alternate. ". . . (3) Enter a permanent injunction against defendants requiring them to:

(a) Accept for filing, without payment of fees and costs, the papers attached as Exhibit "A";

(b) Permit the named plaintiffs to proceed with their divorce actions without payment of fees and costs;

(c) Effect all necessary service and notice incident to the divorce actions without payment of fees and costs by the named plaintiffs;

(d) Take similar action with respect to future divorce proceedings initiated by other members of the class represented by the named plaintiffs."

Complaint A. 10.

This idea itself seems unconstitutional when one considers that fundamental to our democracy is a tripartite

system of government. Each branch has primary responsibility in mutually exclusive areas and neither the legislative, judicial nor executive functions were conceived to second guess or otherwise undermine the other. *Harper* v. *Virginia Board of Elections,* 383 U.S. 633, 675 (dissenting opinion of Black, J.) More specifically, courts cannot invalidate legislation merely because it is unwise or they would have done it another way.

> "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases — that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely — has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned * * * with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' . . ."
>
> *Ferguson* v. *Skrupa,* 372 U.S. 726, 730, 83 S. Ct. 1028, 1031 (1963).

This court cannot acquire a license to legislate merely because a statute has a harsh result. In a case testing the constitutionality of a New York City ordinance requiring foreclosure of tax liens without regard to the amount owed relative to the value of the property, this court said:

> "It is contended that this is a harsh statute. The

New York Court of Appeals took cognizance of this claim and spoke of the 'extreme hardships' resulting from the application of the statute in this case. But it held, as we must, that relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed. . . ."

Nelson v. *City of New York*, 352 U.S. 103, 110, 77 S. Ct. 195, 199 (1956).

B. The development of an in forma pauperis statute necessarily requires the use of skills more appropriate to the legislative function of government.

Practicality as well as precedent should restrain the court from interfering with the legislative process. Appellants essentially ask the court to devise a general in forma pauperis procedure but, to properly develop such a statute, one must consider a myriad of complex economic and social factors. The district court in this case recognized that a legislature was more suited to make such determinations when it said:

"Militating against striking down the present fee legislation by judicial fiat is the extreme difficulty of judicial determination of the course the state should be required to follow. Should the relief agencies provide the fees as part of support to the indigent? From what source should such funds be obtained, and how should they be administered? Should the state courts be required to waive court fees for the indigent? The choice of which method is more fitted to the needs and policy of the state is a legislative choice the courts should take on only if necessary. Likewise with related matters. Should the state pay for the indigent other quite essential costs, which are not provided or paid for by the state for any private litigants, such as process service

fees, or service by publication, investigative and legal services?"

Boddie v. *Connecticut*, 286 F. Supp. 968 (D. Conn. 1968) A. 44, 45.

The factors to be considered certainly are not limited to those listed by the district court. At what level of income should one be allowed to proceed in forma pauperis? Appellants have limited the class to welfare recipients, but does that discriminate against other persons too poor to pay the entry and service fees? What form should the financial affidavit take? Appellants' affidavits to the Superior Court in Connecticut even fail to assert that they are entitled to redress as is necessary under the federal statute 28 U.S.C.A. 1915(a). See financial affidavits (A. 11-28). Can the State protect the financial interest of all its citizens by challenging the fact of indigency or the need for service by publication? See *Jefferies* v. *Jefferies*, 296 N.Y.S. 2d 74 (Sup. Ct., Kings Cty. 1968). Can a wife in Connecticut make a valid oath of poverty without also attesting to the poverty of her spouse in view of Conn. Gen. Stat. Sec. 46-10 which makes the husband responsible for most of the necessary expenses of his wife?

The same answers to the above questions do not apply in all situations, i.e., compare the in forma pauperis legislation found in the several states. See Amicus Curiae brief of the National Legal Aid And Defender Association, Appendix A. Colorado excludes divorce actions by men, Louisiana excludes all divorce and separation actions, Michigan requires an affidavit showing a meritorious claim, North Carolina requires proof by one or more witnesses that there is a good cause of action, etc. One necessarily concludes that each state legislature has felt the need to enact different safeguards to prevent abuse of its legislation. A legislature is best qualified to make such a local determination.

C. Connecticut is experimenting with innovative concepts as it develops in forma pauperis procedures.

The district court properly viewed the alternatives of court and legislative action when it said:

> "We should rather leave this to correction by the political process through legislative action, which may reach a *more satisfactory* result more speedily than the presently available machinery of the courts can effectively accomplish." (emphasis added)

Boddie v. *Connecticut*, Supra, A. 45

Connecticut has accepted the District Court's challenge and is attempting to solve the problem of access to her courts by the poor. The Connecticut legislature at its 1969 session considered several alternative proposals for a general in forma pauperis procedure. Although the General Assembly was unable to agree on any one of the proposals, Connecticut continues to experiment with a variety of programs to aid in the development of a comprehensive and effective program.

As an example, the State Welfare Department recently announced approval of Connecticut section 1115 demonstration project #543 "Legal Services Program". See Exhibit A attached. Through this project one hundred and fifty selected welfare families in Meriden, Connecticut will be provided the usual crisis legal services as well as the kind of ongoing consultation generally offered by a family lawyer. The program also has a unique provision allowing the client to select an attorney from two panels of lawyers. As relates to the case at bar, the three year demonstration project official summary provides, "Litigation costs will be paid by the Bar Administrator from a separate fund established for that purpose . . ." There are annual appropriations in the budget of two thousand dollars for "court costs" and for "litigation costs". See Exhibit B attached.

In addition, Connecticut has contributed funds to the very organization that represents appellants, i.e., the New Haven Legal Assistance Association, Inc. See Conn. Special Act 272 (1967). These and other funds can be and are used to pay court costs.

> "In the New Haven area, where plaintiffs reside, there is available at least to a limited degree, aid to indigent litigants through the New Haven Legal Assistance Association, Inc. Funds for the support of the Association are obtained from the United States Office of Economic Opportunity, the Ford Foundation, the Meyer Foundation and the State of Connecticut. The money available from this source for court costs, transcripts, sheriff's fees and similar purposes is limited, amounting in the period March 1, 1968 to December 31, 1968 to some $3,100.00. The executive director of the association allocates the funds available for such purposes on an evaluation of the relative importance of the individual case. Money for payment of the entry fees on appeal from the fair hearings was denied the instant plaintiffs essentially for lack of sufficient funds to cover all requests."
>
> *Frederick* v. *Schwartz,* 296 F. Supp. 1321, 1322 (D. Conn. 1969)

Connecticut's response to the District courts' challenge is hardly static. The above examples were not presented to indicate that Connecticut has solved the problem of providing legal services for the poor. The examples are indicative of an attempt through innovation and analysis to find the best possible criteria on which to base an in forma pauperis statute. The alternatives are many; proper selection is necessarily a function of the legislative process.

II.

THE GRIFFIN DOCTRINE SHOULD BE LIMITED TO CASES CONCERNING THE PERSONAL LIBERTY OF AN ACCUSED.

> **"There shall be paid to the clerks of the Supreme court or the Superior court, for each civil cause, forty-five dollars, . . ."**

Connecticut General Statute Sec. 52-259, partially quoted above, is completely neutral on its face; it was not enacted to discriminate against the indigent; nor is it applied by the State in a manner that is wilfully discriminatory. The statute requires the payment of a forty-five dollar entry fee by all persons wishing to file a civil action in the Superior Court. Appellants claim that they have been denied equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution solely because of unintentional and accidental inequality. The claim is based on the decision in *Griffin* v. *Illinois,* 351 U.S. 12 (1956).

Griffin, after conviction in the state courts of Illinois, was denied a free transcript essential to the presentation of an appeal. The Illinois statute which required payment of a fee by all persons desiring a transcript did not violate any of the traditional tests for equal protection. See *Jefferies* v. *Jefferies,* 296 N.Y.S. 2d 74, 84 (Sup. Ct., Kings Cty. 1968). This court, nonetheless, held the Illinois statute unconstitutional based on the novel concept that even unintentional inequality violates due process.

A. There is no legal precedent to extend the Griffin Doctrine to civil litigation.

Griffin was decided on the specific facts of a criminal case. No decision of this court based on the Griffin Doctrine

has extended beyond the realm of the personal liberty of an accused. See *Burns* v. *Ohio*, 360 U.S. 252 (1959), entry fee in a criminal appeal; *Smith* v. *Bennett*, 365 U.S. 708 (1961), entry fee for habeas corpus; *Lane* v. *Brown*, 372 U.S. 477 (1962), transcript of writ of error coram nobis; *Long* v. *District Court of Iowa*, 385 U.S. 192 (1966), transcript in habeas corpus proceeding. This court necessarily interpreted the Griffin doctrine to exclude civil matters when it denied certiorari in a case requiring the payment of certain fees as a condition precedent to defending a summary process action. *Williams* v. *Shaffer*, 385 U.S. 1037 (1967).

B. Divorce is not a right of sufficient magnitude to qualify for relief on the extraordinary grounds of the Griffin Doctrine.

No one denies that the right to life and freedom at issue in criminal cases raises questions about man's most precious right and, as such, should be afforded the greatest possible protection. But there is a scale on which the subjects of equality are ranked. *Boddie* v. *Connecticut*, supra (A. 43). Only those subjects ranked the highest are entitled to relief based on the extraordinary grounds found in Griffin; divorce does not so qualify.

The essential nature of a divorce is not consistent with the status of a fundamental right. Divorce is not an original activity, i.e., the participant's status is necessarily controlled by a precedent action *voluntarily* done. For divorce, the factor is marriage. Appellees urge that there is no constitutional right to be extracated from a predicament of one's own creation.

As for Connecticut, the State's interest is stated in *Casale* v. *Casale*, 138 Conn. 490, 492, 493:

> " 'As the State favors marriages for the reasons stated, so the State does not favor divorces; and only permits a

> divorce to be granted when those conditions are found to exist, in respect to one or the other of the named parties, which seem to the legislature to make it probable that the interests of society will be better served and that parties will be happier, and so the better citizens, separate, than if compelled to remain together.' *Dennis* v. *Dennis*, 68 Conn. 186, 197, 36 A. 34; *Morgan* v. *Morgan*, 103 Conn. 189, 195, 130 A. 254; *Andrews* v. *Andrews*, 188 U.S. 14, 30, 23 S. Ct. 237, 47 L. Ed. 366; Keezer, Marriage & Divorce (3d Ed.) § 870; 1 Nelson, Divorce & Annulment (2d Ed.) § 2.01."

Marriage and procreation have been found to be fundamental legal rights.

> *Loving* v. *Virginia*, 388 U.S. 1 (1967)
> *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942)

But, one must question whether divorce has achieved that status.

> "There can be no such thing as a 'legal right' to a divorce vested in any married person."

> *Allen* v. *Allen*, 73 Conn. 54, 55 (1900)
> See also *Casale* v. *Casale*, 138 Conn. 490 (1952)

Even if the court were to elevate divorce to the position of a fundamental constitutional right, that status alone does not guarantee a person a divorce whenever he desires one. Marriage and procreation which are classified above as rights are subject to many limitations. See Conn. Gen. Stat. Sec. 46-1, 55 C.J.S. Marriages Sec. 16, 44 C.J.S. Insane Persons Sec. 71. Divorce may be similarly limited.

Whether divorce is called a "fundamental constitutional right", a "privilege" or an "original activity" it does not

present issues of a calibre similar to those concerning the life and liberty of an accused person.

C. The Griffin Doctrine is only justified in a criminal type proceeding where the state is an actual participant having an adversary interest.

The types of situations where *Griffin* is normally applied are further distinguished from divorce actions by the nature of the state's interest in each type of proceeding. In a criminal case the state has a direct interest — it is an actual participant taking an adversary position. Great abuses are possible in this situation based, in part, on the imbalance of power between the participants. The criminal defendant should be given every possible protection against the misuse of sovereign power. The Griffin Doctrine, rightfully requires that this protection be given without consideration of the wealth of the accused.

> "Both equal protection and due process emphasize the central aim of our entire judicial system — all people charged with *crime* must, as far as the law is concerned, 'stand on an equality before the bar of justice in every American court . . .'" (emphasis added)
>
> *Griffin* v. *Illinois*, 351 U.S. 12, 17

The state does have an interest in divorce proceedings. See brief of National Legal Aid and Defender Association as Amicus Curiae, App. C. It is not the interest of an adversary. The participants in a divorce proceeding are of equal status independent of the state and thus both are insulated from any abuse of sovereign power.

The District Court recognized this distinction when it said:

> "In the ordinary civil (including divorce) case the

state has no such direct participation, merely providing judicial machinery for determination of the disputes."

Boddie v. *Connecticut*, Supra. (A. 44)

The Appellees do not ask the court to limit the Griffin Doctrine merely because it always has been limited. They have enumerated differences which substantiate the past restriction and justify its continuance. The court is asked to contemplate the repercussions if protection against the unintentional discrimination proscribed in *Griffin* is extended to situations not involving the personal liberty of an accused. Would the state have to waive all fees for the indigent, e.g. marriage license, driver's license, hunting license or even road tolls? The proposition will not be fantasy if the Griffin Doctrine reaches the facts of this case.

III.

THE PREPAYMENT OF COURT ENTRY FEES REQUIRED BY CONNECTICUT GENERAL STATUTES SEC. 52-259 IS A CONSTITUTIONAL EXERCISE OF SOVEREIGN POWER.

A. The entry fees are reasonably related to legitimate state interests.

The prepayment of entry fees required by Connecticut General Statutes, Sec. 52-259, bears a reasonable relationship to legitimate state interests. *Boddie* v. *Connecticut*, Supra. (A. 44). Any resultant classification is not unconstitutional.

Rapid Transit Corp. v. *City of New York*, 303 U.S. 573 (1938)

The revenue received from entry fees is used to support the judicial system. It seems emminently fair that the cost of running a particular institution should be borne by those

who make use of the available facilities. The District Court indicated that twenty per cent of the judicial budget comes from court fees. *Boddie* v. *Connecticut*, Supra. (A. 44). Appellants assert that the figure is ten per cent. Appellees' brief p. 44 and Exhibit I. Even using the smaller figure the amount is a substantial one million five hundred thousand dollars. Clearly, waiving fees and paying notice by publication costs would create a substantial loss of revenue to the state thereby placing an excessive burden on the State's other funds.

Entry fees have the classical effect of reducing the amount of frivolous litigation. *Boddie* v. *Connecticut*, Supra. (A. 44). The State of Connecticut has a responsibility to provide for the efficient operation of its courts and to prevent their abuse. Conditioning the use of the court on the prepayment of a fee has always been used as a deterrent to ill brought litigation. Appellants urge that only the poor are prevented from bringing frivolous suits, not the wealthy. Appellants brief p. 42. It is respectfully submitted that appellants should not forget the vast middle classes who earn a moderate living and must make a financial sacrifice if they choose to bring a civil action. This large group might be the subject of discrimination if only welfare recipients are granted in forma pauperis privileges. One must not create reverse discrimination. See *Griffin* v. *Illinois*, 351 U.S. 12 (1956). Dissenting opinion of Justice Harlan p. 35.

Appellants urge that when classifications are based on "suspect criteria" or affect "important rights", then the state must go beyond showing a rational relationship to a legitimate state interest — it must show a "compelling" state interest. Appellants brief p. 38. This principle is not applicable to the case at bar. The cited authority only relates to fact patterns where the state or city is an actual litigant — an adversary participating in the suit. *Rapid Transit Corp.* v.

City of New York, 303 U.S. 573 (1938), the validity of a city tax; *Shapiro* v. *Thompson*, 89 S. Ct. 1322 (1969), residency requirements for state welfare recipients; *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966), State poll tax; *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), criminal statute on mixed race cohabitation; *Hernandez* v. *Texas*, 347 U.S. 475 (1954), systematic exclusion of Mexican Americans from criminal jury panels; *Carrington* v. *Rash*, 380 U.S. 89 (1965), right of armed forces personnel to vote when they are Texas domiciliaries; *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966), indigent accused later imprisoned was unconstitutionally required to pay for transcript but not indigent accused who was freed. There might be a need for more strict criteria when the state is a party and can directly affect the outcome of a case but that need does not exist in civil actions where the state does not directly participate.

Appellants list several alternate methods of limiting frivolous litigation. Appellants brief p. 43. They contend that the court should select their catalog of alternatives and eliminate entry fees. This type of selection is clearly a legislative function and the court should not interfere. (See discussion above.)

IV.

THE COURT SHOULD MAINTAIN THE TRADITIONAL CONCEPT THAT CIVIL LITIGANTS ARE RESPONSIBLE FOR THE COSTS INCIDENTAL TO BRINGING A LEGAL ACTION.

The right to or liability for costs incidental to the bringing of a legal action is statutory in nature. *Wilmot* v. *City of South Bend*, 221 Ind. 538 (1943). Traditionally, the civil litigant has been responsible for these costs.

"Costs are a part of the burden of litigation, and

no litigant is deprived of a constitutional right by statutes which impose such costs on him."

Daniel v. *Daniel*, 116 Wash. 82 (1921)
See also *Marquardt* v. *Fisher*, 135 Ore. 256 (1931)

A. Connecticut courts cannot waive payment of costs.

In asking the court for permission to avoid the responsibility of paying costs for a civil divorce action, appellants suggest that the Connecticut Superior Court might have the inherent right to waive costs. Appellants' brief p. 34. This concept has been specifically rejected in Connecticut.

". . . The clerks are accountable to the comptroller for the collection of fees required, and this court is without power to direct that they be waived."

In re Appeal of Dattilo, 135 Conn. 411, 412 (1949) Appellants concede that the ruling in Dattilo prevails in the majority of jurisdictions. Appellants' brief p. 34.

B. One sues in forma pauperis as a matter of privilege.

Since Connecticut at this time has no general in forma pauperis statute and its courts cannot waive costs of their own initiative, then appellants can only receive the requested relief if there is a *constitutional right* to litigate civil actions without the payment of costs.

The ability to proceed in forma pauperis in civil litigation has always been viewed as a privilege. *Smith* v. *Firestone Tire & Rubber Co.*, 255 F. Supp. 905 (E.D. Penn. 1966); *Bowman* v. *White*, 388 F. 2d 756 (4th Cir. 1968); *U. S.* v. *Madden*, 352 F. 2d 795 (9th Cir. 1965).

The most liberal statute authorizing in forma pauperis procedures itself contains limitations that are inconsistent with rights of constitutional magnitude.

> "(a) . . . An Appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith. . . .
>
> (d) the court may . . . dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 28 U.S.C.A. Sec. 1915

A constitutional right cannot be diluted by the precondition that a judge must approve the claim's fundamental merit in some way before the right may be exercised as is required by 28 U.S.C.A. 1915. Can the court envision a judge being required to determine whether an accused will be injured by the absence of an attorney before a Miranda warning must be given? The distinction comes into focus when one views an excerpt from the decision in a civil action for damages reported as *Smith* v. *Firestone Tire & Rubber Co.*, 255 F. Supp. 905 (E.D. Penn. 1966), at p. 907.

> "To choose between the pejoratives 'not in good faith'; 'frivolous' — and the quite opposite characterization: 'presents a substantial question', would be to make an artificial and inaccurate choice.
>
> It seems more reasonable, in the present instance, to say that the court has analyzed the points asserted on appeal, as well as the asserted hardships, in the light of the nature of the case — and in the exercise of discretion has determined that the appeal should not be allowed in forma pauperis. Influencing that decision, but not controlling it, is the opinion of this Court that the plaintiff is not likely to succeed on appeal. 28 U.S.C.A. § 753(f). As was said in Smart v. Heinze, 347 F. 2d 114, 116 (9th Cir. 1965):

'To proceed *in forma pauperis* is a privilege not a right. Clough v. Hunter, 191 F. 2d 516 (10th Cir. 1951). It is the duty of the District Court to examine any application for leave to proceed *in forma pauperis* to determine whether the proposed proceeding has merit and if it appears that the proceeding is without merit, the court is bound to deny a motion seeking leave to proceed *in forma pauperis*. Tate v. People, et al., 187 F. 2d 98 (9th Cir. 1951); Huffman v. Smith, 172 F. 2d 129 (9th Cir. 1949); Meek v. City of Sacramento, 132 F. Supp. 546 (N.D. Cal. 1955). . . .' "

The difference is obvious and compelling — Congress has never considered civil in forma pauperis actions to be constitutionally compelled.

Another bar to the finding of a constitutional mandate for appellants' claim lies in the very nature of the relief sought, i.e., not only must the state waive the statutory entry fees due the court but the state must also make arrangements for service of original process. See Complaint (A. 9, 10). The claim is unique — only once has a court gone so far as to declare that auxiliary expenses (those payable by litigants to third persons other than public officials) necessary to the effective prosecution of a divorce action must, of constitutional necessity, be paid by the state. *Jefferies* v. *Jefferies*, 296 N.Y.S. 2d 74 (Sup. Ct., Kings Cty., 1968). Note that the Supreme Court of New York is not the highest court of that state.

The *Jefferies case* is distinguishable from the case at bar. In New York a general in forma pauperis statute existed at the time *Jefferies* was being decided. This indicated a legislative intent not yet expressed in Connecticut. That statute provided a source for funds to pay costs similar to auxiliary expenses. *Jefferies* v. *Jefferies*, Supra, p. 88. Connecticut has made no appropriation for this type of expenditure. Note-

worthy exception are funds for the legal services demonstration project and the New Haven Legal Assistance Association, Inc. mentioned above. The state's funds cannot be used for purposes other than those for which they have been appropriated.

Dellaripa's Appeal, 88 Conn. 565, 569 (1914)

In *Jefferies,* p. 90, Supra, the court held that the State of New York may challenge the need for service by publication as well as the fact of indigency. One can only speculate as to the result if the State of Connecticut were allowed to challenge the type of service as well as the indigency of the Appellants: Nine persons were listed as the named plaintiffs in the caption of the complaint filed in the District Court on April 20, 1968. See Complaint, (A. 8). Catharine Strain withdrew from the appeal in this court for unknown reasons. See Notice of Appeal, (A. 48). Of the remaining plaintiffs, Betty Ann Perez already has a divorce action pending, Docket No. 117654 F.R., in the Connecticut Superior Court for New Haven County. See letter attached as Appellees' Exhibit C. Bertha Baker favorably settled a negligence action, Docket No. 97526, on September 28, 1967 only five months before signing an affidavit of poverty. See Exhibit C and Affidavit (A. 23). Appellees know of only four financial affidavits having been filed with this court: Mary R. Yeaton, Gladys G. Boddie, Mary Wierzbicki and Mary Ann Dozier. These facts raise serious doubts about the appellants' inability to gain access to the State Courts because of indigency. The New York procedure outlined in *Jefferies* v. *Jefferies,* Supra, provides a means for resolving these doubts — Connecticut obviously lacks the necessary safeguards to challenge indigency or the need for publication.

The legal basis for the New York court's conclusion in the Jefferies case was an extension of the Griffin Doctrine to include civil matters. This concept has been disclaimed above.

Appellees respectfully submit that the *Jefferies case* does not provide a result appropriate for general application.

V.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION ONLY PROTECTS RIGHTS THAT ARE CONSTITUTIONALLY GUARANTEED.

Appellants claim that they are unconstitutionally denied due process of law by the imposition of the entry fee required by Conn. Gen. Stat., Sec. 52-259. See Complaint (A. 9). They assert that there is an all-encompassing First Amendment right to petition the court for redress of grievances and this right is guaranteed by the State through the due process clause of the Fourteenth Amendment to the United States Constitution as interpreted in *Button* v. *NAACP*, 371 U.S. 415 (1963), *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964) and *United Mine Workers of A. Dist.* 12 v. *Illinois State Bar Association*, 389 U.S. 217 (1967). Appellants' brief p. 26-37.

A. Divorce is not a constitutionally guaranteed right.

Appellants' position is untenable. *Button, Trainmen* and *Mine Workers* are cases where organizations in various ways provided legal counsel to be used by individual members in prosecuting their personal legal claims. The court had to consider statutes which completely eliminated an activity, i.e., the provision for legal services by a group. Essential to each decision is the court's determination that group assembly to provide legal services is an undeniable element of due process. But divorce can only be granted by statutory authority. *Steele* v. *Steele*, 35 Conn. 48, 54 (1868). Since one legislature is not bound by the actions of a preceding legislature,

the state could completely eliminate divorce procedures if it so desired. *Patterson* v. *Dempsey,* 152 Conn. 431, 439 (1965). Therefore, divorce cannot be an essential element of due process. Also, the present case is devoid of the question of group rights as found in *Button, Trainmen,* and *Mine Workers.*

Once a state, in fact, grants a statutory procedure for obtaining a divorce, its citizens can only claim that the statutory right is being applied in a discriminatory fashion. Very little discrimination is so unjustifiable that it violates due process. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). Indeed, appellants concede that their due process argument is not meant to consider unequal application of the provisions of Conn. Gen. Stat., Sec. 52-259. Appellants' brief p. 29. The claimed violation of due process is, therefore, groundless.

CONCLUSION

Appellants are welfare recipients who claim that they are prevented from prosecuting their claims for divorce because they cannot afford the fees required by the laws of Connecticut. The proposition compels empathy.

The provision of legal services for the poor is a need of great social moment but appellants have sought redress before the wrong body. Resolution of this problem requires legislative action. Courts cannot legislate merely because they believe what the legislature has done is unwise or unsympathetic to the problems of a particular group.

To justify judicial legislation appellants have asked the court to extend legal precedents beyond their logical limitations. These extensions range from applying the Griffin Doctrine to cases not involving the personal liberty of an accused to a claim that Due Process clause limitations must apply to the statutory right of divorce. To enter the legislative sphere,

the court would have the dubious task of accepting *all* of the appellants' proposals.

The court should affirm the decision of the three-judge District Court which granted Appellees' motion to dismiss.

> "Although with some hesitation, we conclude that the court should not, by resort to the Constitutional guarantees which for 100 years have been considered not to demand such state action, attempt to speed up the amelioration of the lot of the indigent by forcing the state to provide free access to the civil courts without payment of a relatively modest fee. We should rather leave this to correction by the political process through legislative action, which may reach a more satisfactory result more speedily than the presently available machinery of the courts can effectively accomplish."

Boddie v. *Connecticut*, supra. (A. 45)

Respectfully submitted,

ROBERT K. KILLIAN
Attorney General

By: RAYMOND J. CANNON
Assistant Attorney General

Attorneys for Appellees

30 Trinity Street
Hartford, Connecticut 06115

Of Counsel:

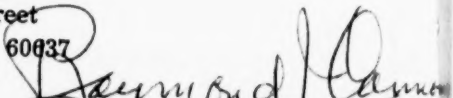
WILLIAM S. KAPLAN
30 Trinity Street
Hartford, Connecticut 06115

Certificate of Service

I, Raymond J. Cannon, attorney for the appellees, certify that on the thirtieth day of September, 1969, I served a copy of the foregoing Brief on the appellants by mailing air mail, postage prepaid, to the following attorneys of record:

ARTHUR B. LAFRANCE, ESQ.
New Haven Legal Assistance Association
College of Law
Arizona State University
Tempe, Arizona 85281

ALLAN ASHMAN
BETTIE MCJUNKIN
1155 E. 60th Street
Chicago, Illinois 60637



RAYMOND J. CANNON
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06115

EXHIBIT A

DEPARTMENT OF HEALTH, EDUCATION & WELFARE
Social and Rehabilitation Service
Washington, D.C. 20201

July 8, 1969

Mr. Bernard Shapiro
Commissioner
State Welfare Department
1000 Asylum Avenue
Hartford, Connecticut 06115

Dear Mr. Shapiro:

This will confirm our telegram that the Connecticut section 1115 demonstration project #543 "Legal Services Program," has been approved. The total approved budget is $119,974, of which $32,483 is a grant from special Federal project funds. Approval is conditional on a consultation visit from the Regional and Central Office staff in the near future for the development of the evaluation plan, and on submission of the drafts of the three contracts to central office for review before they are let.

The first progress report on this project is due no later than May 1, 1969, and should accompany the request for continuation for the second year.

We are sending you under separate cover a supply of Form FS 142.7 Schedule P, and instructions for submitting reports on demonstration expenditures with the regular quarterly expenditure statement in order that you may claim addi-

tional Federal funds up to the limits specified above.

Sincerely yours,

James F. Garrett
Assistant Administrator
Research, Demonstrations and Training

Enclosures

7-11-69

cc. Mr. Harder
Mr. Bauer
Mr. Tevald

EXHIBIT B

Excerpt from Budget for demonstration project
NO. 543 "Legal Services Program"
ATTACHED LIST #3

OTHER EXPENDITURES	Total Cost	Regular Federal Share	S.F.P. Funds
25 Panel Lawyers (average 3 clients @ 30 hrs. ea. @ rate of $16. per hour, total of 2250 hours)			
ADC	32,400.00	24,300.00	8,100.00
Adult categories	3,600.00	1,800.00	1,800.00
Rental & maintenance of office space 800 sq. ft. @ $4.00 per sq. ft. per one year and $.50 per sq. ft. for maintenance	3,600.00	2,700.00	900.00
LEGAL EXPENSES: Court costs	1,000.00	750.00	250.00
Reserve fund for law students and cases with waiver of 30 hr. limitation	7,100.00	5,325.00	1,775.00
Bar Administrator	4,500.00	3,375.00	1,125.00
Litigation Costs	1,000.00	750.00	250.00
Bonding & insurance	350.00	262.50	87.50
Law library & publications	2,000.00	1,500.00	500.00
OFFICE EXPENSES: Rental of copier	500.00	375.00	125.00
Accounting	300.00	225.00	75.00
Telephone	1,000.00	750.00	250.00
Postage	200.00	150.00	50.00
Evaluation of Project	8,000.00	6,000.00	2,000.00
Staff Training & Conferences	4,000.00	3,000.00	1,000.00
	69,550.00	51,262.50	18,287.50

EXHIBIT C

STATE OF CONNECTICUT

Supreme Court

AND

Superior Court

IN AND FOR NEW HAVEN COUNTY

EDWARD HORWITZ, CLERK
ASSISTANT CLERKS
VINCENT J. FASANO
LEONARD J. GILHULY
LOUIS P. HURLEY, JR.
HAROLD J. IVEY
JOHN J. MANNION

CLERK'S OFFICE, NEW HAVEN

July 7, 1969

Raymond J. Cannon
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut

Dear Mr. Cannon:

In reply to your letter of July 7, 1969, please be advised that we have checked our records concerning the persons mentioned in said letter and have found the following:

No. 117654 F. R. Betty A. Perez of New Haven vs. Louis A. Perez, a divorce action, returnable first Tuesday in August, 1968.

No. 97526, Cecil Livingston and Bertha Barker, both of New Haven vs. Edward E. Borsoi, a negligence case, returnable first Tuesday of November, 1961, which was settled on September 28, 1967 and withdrawn on October 27, 1967.

Very truly yours,

EDWARD HORWITZ
Clerk of Superior Court

EH/pr

FILE COPY

FILED
OCT 27 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~265~~ 27

GLADYS BODDIE, ET AL.,
Appellants,

v.

THE STATE OF CONNECTICUT, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF AMICUS CURIAE THE ATTORNEY GENERAL OF MARYLAND

In which the several States shown herein have joined through their respective Attorneys General.

FRANCIS B. BURCH,
Attorney General of Maryland,

J. MICHAEL MCWILLIAMS,
Asst. Attorney General
of Maryland.
1200 One Charles Center,
Baltimore, Maryland 21201

The Daily Record Co., Baltimore, Md. 21203

JOINING IN THE BRIEF

The Honorable David P. Buckson
Attorney General
State of Delaware
1206 King Street
Wilmington, Delaware 19801

The Honorable Jack P. Gremillion
Attorney General
State of Louisiana
Department of Justice
Baton Rouge, Louisiana 70804

The Honorable Clarence A. H. Meyer
Attorney General
State of Nebraska
Department of Justice
Lincoln, Nebraska 68509

The Honorable Harvey Dickerson
Attorney General
State of Nevada
Department of Attorney General
Carson City, Nevada 89701

The Honorable Helgi Johanneson
Attorney General
State of North Dakota
State Capitol
Bismarck, North Dakota 58501

The Honorable Lee Johnson
Attorney General
State of Oregon
Department of Justice
Salem, Oregon 97310

Table of Contents

	PAGE
Interest of Amicus Curiae	2
Opinion Below	2
Jurisdiction	2
Statutory Provision Involved	2
Questions Presented	3
Statement of the Case	3
Argument	3
Conclusion	7

Table of Authorities

Cases

Boddie v. Connecticut, 286 F. Supp. 968 (D. Conn. 1968)	1, 2, 5-6
Ferguson v. Skrupa, 372 U.S. 726 (1963)	7
Griffin v. Illinois, 351 U.S. 12 (1956)	4
Harvester Company v. Department of Taxation, 322 U.S. 435 (1943)	7
Knowlton v. Moore, 178 U.S. 41 (1910)	7
Nelson v. City of New York, 352 U.S. 103 (1956)	7
Rosado, et al. vs. Wyman, et al., Nos. 711, 726, 729, Sept. term, 1968 (U. S. Ct. of Appeals, 2nd Circuit), July 16, 1969)	5

Statutes

State:	
Conn. Gen. Stat. §52-259	2-3

Other Authorities

Discriminations Against the Poor and the Fourteenth Amendment, 81 Harvard Law Review 435 (1967)	6-7
Public Provisions for Costs and Expenses of Civil Litigation (Draft) American Bar Association (June 1966)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 265

GLADYS BODDIE, ET AL.,

Appellants,

v.

THE STATE OF CONNECTICUT, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF AMICUS CURIAE THE ATTORNEY GENERAL OF MARYLAND

In which the several States shown herein have joined through their respective Attorneys General.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Attorney General of Maryland files this Brief Amicus Curiae pursuant to Supreme Court Rule 42, to ask this Honorable Court to sustain the decision of the United States District Court for the District of Connecticut in the case of *Boddie, et al. v. the State of Connecticut, et al.*, 286 F. Supp. 968 (1968).

INTEREST OF AMICUS CURIAE

The State of Maryland and the States which have joined herein are seven of the approximately twenty states which have no general in forma pauperis legislation.

The myriad fiscal, economic and administrative difficulties which would arise should this court reverse the three-judge District Court has caused the Attorney General of Maryland and the Attorneys General listed herein to join in support of the sustentation of the decision below.

OPINION BELOW

Judgment of a three-judge United States District Court for the District of Connecticut entered July 17, 1968, denied an injunction which sought to restrain the enforcement of a state statute. The opinion of the three-judge District Court for the District of Connecticut is reported in 286 F. Supp. 968.

JURISDICTION

The jurisdiction of this Court to review by appeal the judgment of the three-judge United States District Court for the District of Connecticut is conferred by 28 U.S.C. 1253. Probable jurisdiction was noted on June 23, 1969.

STATUTORY PROVISION INVOLVED

Sec. 52-259 of the General Statutes of Connecticut as amended by Pub. Act 628, Sec. 3 (Conn. Gen. Stat. Ann., Vol. 25, 1967, Supp., p. 29):

"Sec. 52-259 Court fees.

"There shall be paid to the clerks of the supreme court or the superior court, for entering each civil cause, forty-five dollars, and to the clerks of the court of common pleas for entering each civil cause, thirty dollars. There shall be paid to the clerk of each court,

other than probate courts, by any party who requests a finding of fact by a judge of such court to be used on appeal, the sum of twenty dollars, to be paid at the time the request is filed. Such clerks shall also receive for receiving and filing an assessment of damages by appraisers of land taken for public use or the appointment of a commissioner of the superior court, two dollars; for recording the commission and oath of a notary public or certifying under seal to the official character of any magistrate, two dollars; for certifying under seal in verification of copies of files or records or whenever required by law, two dollars; for making all necessary records and certificates of naturalization, the fees allowed under the provisions of the United States statutes for such services; and for making copies, at the rate of fifty cents a page, except there shall be no charge for one plain or certified copy of a judgment to any party to the action."

QUESTION PRESENTED

Does the requirement of filing fees and costs which is a prerequisite to access to the state courts deny the equal protection of the laws guaranteed by the Fourteenth Amendment to those who are unable to pay such fees and costs?

STATEMENT OF THE CASE

The Attorney General of Maryland adopts the appellee's statement of the case.

ARGUMENT

THE NATURE OF THE RELIEF SOUGHT BY APPELLANTS REQUIRES LEGISLATIVE ACTION AND NOT JUDICIAL LEGISLATION.

The Appellees have well and ably argued the lack of constitutional protection for the rights Appellants allege have been denied them and those arguments need not be repeated here.

The Attorney General of Maryland urges this Court to consider, in their evaluation of any possible extension of the *Griffin* Doctrine (*Griffin v. Illinois*, 351 U.S. 12 (1956)), the myriad fiscal, economic and administrative difficulties inherent in such an extension.

It is but an exercise in simple logic to conclude that the requirement of court entry fees, etc. creates two classes — those who can afford to pay may enter the courtroom but such entrance is foreclosed to those without sufficient funds. We have been thus introduced to the classification by the grace of simple logic but to eliminate the classification by the grace of judicial fiat would be to ignore the mode of introduction.

The change of a logical conclusion without regard to the premises upon which it is based results in an unreasoned conclusion. So it is here, the conclusion must be a reasoned one and its strength must relate directly to its foundation. But who should lay this foundation? Should it be laid with the bricks of sociological awareness alone or with those bricks, and the mortar of legislative flexibility and power? Perhaps the bricks can be laid by one and the mortar forced into the cracks later, by another. The answer again lies in simple logic — the best foundation is of brick and mortar, laid together by the same hand — expert in both.

There is more involved here than just the waiving of court entry fees for those who cannot afford them. It is an exercise in futility to provide for the embarkation of an indigent upon the sea of litigation with neither power of sail or motor, nor guidance by helmsman and compass. Waive the entry fee for the indigent but deny him costly service procedures and an attorney and he is left in the same hopeless plight with only the setting changed.

Recognizing this paradox the American Bar Foundation has stated that "merely eliminating court fees and costs would not be enough to make the courts accessible to the poor. Some system is needed to cover the auxiliary expenses of litigation, such as publication fees, bond premiums, fees of investigators and expert witnesses, and, * * * court stenographers." *Public Provisions for Costs and Expenses of Civil Litigation* (Draft), American Bar Foundation (June 1966, Page 5).

Any justification for enjoining enforcement of an entry fee statute such as Connecticut's could be expanded to require provision of other services denied the poor.

Whatever the technical justification for over-turning lower court decisions, the ramifications will be monumental, and the practical effect would be to order legislative appropriation of funds, Cf. *Rosado, et al. v. Wyman, et al.*, Nos. 711, 726, 729, Sept. Term 1968, United States Court of Appeals, 2d Circuit, July 16, (1969).

The court below recognized the difficulties inherent in the decision urged by the appellants;

> "Militating against striking down the present fee legislation by judicial fiat is the extreme difficulty of judicial determination of the course the state should be required to follow. Should the relief agencies provide the fees as part of support to the indigent? From what source should such funds be obtained, and how should they be administered? Should the state courts be required to waive court fees for the indigent? The choice of which method is more fitted to the needs and policy of the state is a legislative choice the courts should take on only if necessary. Likewise with related matters. Should the state pay for the indigent other quite essential costs, which are not now provided or paid for by the state for any private litigants, such as process service fees, or service by publication, investigative and legal services?

> The duties to its disadvantaged people of an affluent society, as represented by its public institutions, are being recognized more fully daily. Where the handicaps of poverty have resulted in unequal justice in criminal matters the courts have found in the equal protection clause a source of authority to correct the inequalities and to strike down criminal sanctions imposed on those denied equal protection.
>
> Although with some hesitation, we conclude that the court should not, by resort to the Constitutional guarantees which for 100 years have been considered not to demand such state action, attempt to speed up the amelioration of the lot of the indigent by forcing the state to provide free access to the civil courts without payment of a relatively modest fee. We should rather leave this to correction by the political process through legislative action, which may reach a more satisfactory result more speedily than the presently available machinery of the courts can effectively accomplish."

Boddie, et al. v. State of Connecticut, et al., 286 F. Supp. 968, 973-74 (1968).

The elimination of court entry fees will have the natural effect of increasing litigation, to be set on already overcrowded court calendars. Such a ruling may require expansion of court facilities and additional judicial appointments. In short, judicial legislation, in the form appellants deem here appropriate, without consideration, and indeed without the capability of dealing with, the concomitant state interests, is most inappropriate.

> "In addition to the complexities of developing constitutional standards, there remains the question of whether the courts are the appropriate institution to bring about needed changes. There are two general reasons for courts to move cautiously in imposing duties on the states in this area. First, constitutional decisions have the obvious disadvantage of being rather inflexible, cutting off experimentation, and

imposing a uniformity which might not always be desirable. Second, removing discriminations against the poor usually requires governmental expenditures, and decisions affecting the fisc are ordinarily considered a uniquely legislative responsibility. The legislature, unlike a court, can consider alternative uses for public moneys, and it can better compare the costs and benefits of different techniques for aiding the poor. Furthermore, only the legislature can alleviate poverty by redistributing income through shifting the tax burden. The courts have often wisely deferred to the legislature on all questions relating to the fairness of income distribution, for they have accepted the proposition that such decisions should be made by an institution amenable to political pressures and responsible to the electorate."

Discriminations Against the Poor and the Fourteenth Amendment, 81 Harvard L. Rev. 435, 442 (1967).

The abstention urged is not without precedent. *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Nelson v. City of New York*, 352 U.S. 103 (1956); *Harvester Company v. The Department of Taxation*, 322 U.S. 435 (1943); *Knowlton v. Moore*, 178 U.S. 41 (1910).

CONCLUSION

For the reasons stated herein and for the reasons set forth in the appellee's brief, the court should affirm the decision of the three-judge District Court which granted appellee's motion to dismiss.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,

J. MICHAEL MCWILLIAMS,
Asst. Attorney General
of Maryland.

CERTIFICATE OF SERVICE

I, Francis B. Burch, Attorney General of Maryland, Amicus Curiae certify that on the 24th day of October, 1969, I served a copy of the foregoing Brief on the appellants and the appellees by mailing air mail, postage prepaid, to the following attorneys of record:

The Honorable Robert K. Killian
Attorney General
30 Trinity Street
Hartford, Connecticut 06115

Arthur B. LaFrance, Esquire
New Haven Legal Assistance Association
College of Law
Arizona State University
Tempe, Arizona 85281

Allan Ashman
Bettie McJunkin
1155 E. 60th Street
Chicago, Illinois 60637

FRANCIS B. BURCH,
Attorney General of Maryland,
1200 One Charles Center,
Baltimore, Maryland 21201

FILE COPY

FILED
OCT 31 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~265~~ 27

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,

Appellants,

vs.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF APPELLANTS

ARTHUR B. LAFRANCE, Esq.
New Haven Legal
Assistance Association
Mailing Address:
College of Law
Arizona State University
Tempe, Arizona 85281

Attorney for Appellants

INDEX

SUBJECT INDEX

	Page
Table of Authorities	ii
Preliminary Statement	1
Argument	2
I. Appellants Are Indigent and It Is Now Too Late for Appellees, Who Conceded This in the Court Below, to Claim Otherwise on Appeal	2
II. Due Process Guarantees the Right to Petition the Courts for a Divorce Even Though Divorce Itself Is Not Constitutionally Guaranteed	4
III. The Equal Protection Clause Guarantees Equal Access to the Courts	5
IV. Since the Challenged Statutes Involve Suspect Criteria and Impinge Upon Constitutional Rights, They May Be Justified Only by a Compelling State Interest; It Is Not Enough for Them to Be Reasonably Related to a Legitimate State Goal	10
V. This Case Is Appropriate for Judicial Resolution	15
Conclusion	18

Page

Table of Authorities

Baker v. *Carr*, 369 U.S. 186 (1962) 17
Brotherhood of Railroad Trainmen v. *Virginia*, 377 U.S. 1 (1964) 4, 5
Brown v. *Board of Education*, 347 U.S. 483 (1954) 6, 17
Carrington v. *Rash*, 380 U.S. 89 (1965) 11
Coppedge v. *United States*, 369 U.S. 438 (1962) 9
Ellis v. *United States*, 356 U.S. 674 (1957) 10
Flemming v. *Nestor*, 363 U.S. 603 (1960) 9
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 16-17
Griffin v. *Illinois*, 351 U.S. 12 (1956) 6, 7, 8, 9, 10, 18
Harper v. *Board of Elections*, 383 U.S. 663 (1966) 11
Korematsu v. *United States*, 323 U.S. 214 (1944) 11
Loving v. *Virginia*, 388 U.S. 1 (1967) 11
NAACP v. *Button*, 371 U.S. 415 (1963) 4
O'Connor v. *Mullins*, —— Oreg. ——, —— P.2d —— (No. 40550, Aug. 28, 1969) 12-13
Shapiro v. *Thompson*, —— U.S. ——, 22 L. Ed. 2d 600 (1969) 10, 11, 12
Sherbert v. *Verner*, 374 U.S. 398 (1963) 9
Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 11
Suber v. *Suber*, —— N.J. ——, —— A.2d —— (Super. Ct. for Union County, Docket No. M-2366-68, Aug. 25, 1969) 8, 17, 18
United Mine Workers v. *Illinois Bar Association*, 389 U.S. 217 (1967) 4, 5
Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 6

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 265

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,

Appellants,

vs.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF APPELLANTS

Preliminary Statement

Much of Appellees' Brief was anticipated in Appellants' previously filed Brief and there is no need to duplicate here what was there presented. This Reply Brief is therefore limited to analyzing certain of Appellees' arguments for the purpose of defining more precisely the areas of disagreement. There is no intention here to introduce new issues or authorities.

ARGUMENT

I.

Appellants Are Indigent.

These Appellants are poor. This is substantiated by the record below and the Appendix before this Court. More importantly, Appellants' poverty was alleged in the complaint initiating this proceeding and conceded by Appellants' motion to dismiss that complaint. (See opinion below, A. 42)

Yet now, a year and a half later, Appellees seem to contest Appellants' poverty. This is done through Appellees' Brief, at p. 20, by reference to an Appendix C. This Appendix appears to indicate that a Mrs. Perez* now has a divorce proceeding pending and a Mrs. Barker settled a negligence suit in 1967.

The weight and relevance of Appendix C are speculative at best. Certainly the settlement of a negligence suit for an undisclosed amount two years ago has little present significance. Nor does the filing of a divorce action subsequent to the present proceeding negate poverty at the time this proceeding was initiated. In any event, vague speculations affecting only two of the Appellants hardly disqualify the remainder or the class they represent.

There is little point in conjecture concerning Appellees' Appendix C. That Appendix is an improper attempt to introduce evidence at the Appellate level. And it is an attempt to contest an issue which was conceded below. Ap-

---

* By letter filed with this Reply Brief, Mrs. Perez has withdrawn from this Appeal.

pellees should have filed an answer, not a motion to dismiss, in the District Court if they had wished to controvert Appellants' allegations of poverty. Having failed to do so, they are precluded from raising the issue now.

This is true, as well, of Appellees' several references (Appellees' Brief, pp. 9 and 20) to resources supposedly possessed by the organization "representing" Appellants. In fact, Appellants are represented by an attorney, not an organization. Neither the attorney nor the organization employing him has funds to pay Appellants' court costs. (Appellees' Brief, p. 9, clearly acknowledges this.) If Appellees contend otherwise, they should have so alleged in the District Court. Instead, they conceded Appellants' indigency by a motion to dismiss.

Further, whether or not some private organization or individual has funds to pay court costs is irrelevant. The state may not abdicate its responsibility in the hope that charities will fill the void thus created.

Finally, Appellees may contest Appellants' poverty upon remand by this Court. If this Court finds in Appellants' favor, a remand will be necessary to the District Court for appropriate action. At that time, any of the Appellants who are no longer poor would, of course, not be entitled to relief. Appellees remain free to raise the issue then.

But they may not raise the issue of poverty now, since this case is now before the Court only upon the pleadings. And Appellees, by their own pleading, have admitted Appellants' poverty for purposes of this appeal.

II.

Due Process Guarantees the Right to Petition the Courts for a Divorce Even Though Divorce Itself Is Not Constitutionally Guaranteed.

Appellees point out in their Brief (pp. 3 and 4) that "Divorce is a statutory right which the state is not required to provide." So much may be conceded. But Appellees then state that "Due process can only protect constitutionally guaranteed rights." Appellees conclude that, since Appellants seek divorces, no constitutional guarantees are involved.

This misconceives the issue. Appellants' constitutional claim does not relate to divorce, but to the right to petition for redress of grievances. That right is guaranteed by the due process clause of the Fourteenth Amendment. *NAACP* v. *Button*, 371 U.S. 415 (1963), *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964) and *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217 (1967). Connecticut, by barring Appellants from its courts, has acted in contravention of the United States Constitution.

Appellees argue (Brief, p. 21) that the *Button*, *Trainmen* and *Mineworkers* decisions are not authority here because:

> Essential to each decision is the court's determination that group assembly to provide legal services is an undeniable element of due process. But divorce can only be granted by statutory authority.

Such an interpretation misconstrues the thrust of these cases. True, group assembly was involved in each case,

and such assembly is constitutionally protected. But the purpose of assembly was to petition for redress of grievances, a right equally protected. Indeed, in many circumstances, without the latter right there would be little point in assembly.

It is immaterial that the ultimate redress Appellants seek is a matter of statute. Statutory litigation was among the objectives of the groups in the *Trainmen* and *Mineworkers* cases. Yet this Court held that the states there could not deny access to the courts.

Thus, Appellants draw a critical distinction. They do not argue that there is a right to divorce, but only a right to *seek* a divorce. Put another way, Appellants do not claim a right to redress, but only a right to *petition* for redress. The States may deny that redress; they may, as Appellees suggest, totally abolish divorce (Appellees' Brief, p. 22). But they may not arbitrarily and unjustifiably deny the opportunity to petition for redress where divorce exists by law.

III.

The Equal Protection Clause Guarantees Equal Access to the Courts.

The Connecticut statutes involved here require litigants to pay filing fees and service of process expenses. They do not expressly discriminate against the poor. Yet their effect is to bar the poor from the courts.

Appellees curiously argue that the effect of these statutes may be ignored. They claim that any resulting inequality is permissible because it is "unintentional and accidental"

(Appellees' Brief, p. 10; see also p. 3). This might make sense if human beings were abstractions in a closed system of logic. But legislation affects life, and the effect of legislation on the living is of manifest importance.

This is no "novel" idea, as Appellees suggest (Brief, p. 10). Nor is it true, as Appellees assert (Brief, p. 10) that:

> A state's forbearance from unintentional discrimination has never been required by this court, except in cases involving the liberty of an accused.

As long ago as *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886) this Court struck down a statute which was fair on its face but discriminatory in effect. And in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), the "separate but equal" doctrine in education was invalidated. That doctrine, which did not involve "liberty" of an accused, was eminently fair in logic but patently unfair in impact. This is equally true of the statutes involved here. Their effect cannot be ignored.

The most important case in this area, of course, is *Griffin* v. *Illinois,* 351 U.S. 12 (1956). Even Appellees acknowledge (Brief, p. 10) that *Griffin* involves the ". . . concept that even unintentional inequality violates due process." Appellees therefore labor to distinguish *Griffin* from the instant case. The effort is prodigious but unproductive.

Appellees argue (Brief, pp. 3, 10 and 11) that *Griffin* and the cases following it are "criminal" cases, involving "liberty." But this hardly begins to describe those cases. The *Griffin* line of cases involves the broad, fundamental rights of equal protection of the laws and access to the courts. The loss of liberty through criminal process in

those cases only lent urgency to the need for vindicating such rights.

Even on a superficial, semantical level, Appellees cannot distinguish *Griffin* from this case. *Griffin* was not a "criminal" case, nor were the cases following it, since in each the "criminal" process had ended. The individuals involved were seeking to pursue their "civil" appeal and post-conviction remedies. And the litigants in those cases did not seek "liberty." Rather they sought access to the courts, with the ultimate hope of obtaining liberty.

Appellees also argue (Brief, p. 3; see also p. 13) that the " . . . Griffin Doctrine should be limited to cases where the state is a participating adversary." There is no citation for this proposition and its meaning is unclear. What is clear, however, is that the State of Connecticut is most emphatically a "participating adversary" in this case. Only the State has kept Appellants from its courts. And it is the State, through its agents, which is the real Appellee here. This is precisely what was involved in *Griffin*.

Finally, in trying to distinguish *Griffin*, Appellees argue (Brief, p. 3; see also p. 11) that "This Griffin Doctrine should not be extended to include divorce since divorce does not have sufficient weight on the scale of justice." Further, Appellees contend (Brief, p. 11):

> The essential nature of a divorce is not consistent with the status of a fundamental right. Divorce is not an original activity, i.e., the participants' status is necessarily controlled by a precedent action *voluntarily* done. For divorce, the factor is marriage. Appellees urge that there is no constitutional right to be extracted from a predicament of one's own creation.

If nothing else, this argument has the merit of novelty.

Appellees' contention that a voluntary act precludes constitutional safeguards hardly merits response. Criminals in this country, by a voluntary act of crime, surround themselves with constitutional safeguards. Appellees apparently favor those who break the law over those who keep it.

Such a view was rejected in the recent case of *Suber* v. *Suber*, —— N.J. ——, —— A.2d —— (Docket No. M-2366-68, Superior Court of New Jersey for Union County, August 25, 1969). There the Court ordered service of process arranged on constitutional grounds for an indigent divorce litigant, saying (p. 5, memorandum of opinion):

> "It is not hard to understand the cynicism of the people of the ghetto towards our legal system as an outlet for grievances and disputes. A person charged with a criminal offense is brought before the bar of justice expeditiously. He is given a free trial, free lawyer and, if necessary, free appeals. Yet a deserted woman, *who feels as imprisoned as a convict* and who may be able to free society of the burden of supporting her if she could remarry, is denied the relief of our courts. *It is unjust to give better treatment to those who break society's laws than to those who attempt to live by the rule of law and order.*" (emphasis supplied)

This language not only makes clear the relevance of *Griffin* to this case, but it also establishes the gross unfairness of Appellees' position. Justice would be strangely skewed if courts were open to felons, yet closed to those who keep the law and honor it by seeking justice in the courts.

As to Appellees' concern with the "essential nature" of divorce and its weight on the "scales of justice," the issue

here is not whether Appellants are entitled to divorce. The significance of divorce is simply to demonstrate that Appellants are concerned with matters of substance. They are not seeking personal enrichment or vengeance. Nor are they using the courts for a matter which could be settled privately. By its laws, Connecticut has declared that divorce is sufficiently important to be affected with a public interest. Appellees cannot now argue otherwise.

Thus, this Court need not find that divorce weighs heavily on the scales of justice. Indeed, the opposite inquiry is in order: is divorce so devoid of importance as to be beyond constitutional cognizance? Perhaps drivers' licenses and hunting licenses are of such minimal significance, as Appellees suggest (Brief, p. 14). But clearly divorce is distinguishable from these, and the equal protection clause protects a person's right to sue for a divorce.

Appellees, however, argue that (Brief, p. 17) "The ability to proceed *in forma pauperis* in civil litigation has always been viewed as a privilege." From this they apparently conclude that a privilege may be extended or denied irrationally or whimsically. But as the Court noted in *Griffin,* proceedings *in forma pauperis* may indeed be constitutionally protected. And if a matter is so protected, it is of little importance whether it be labeled gratuity, privilege or right. See, e.g., *Flemming* v. *Nestor,* 363 U.S. 603, 610 (1960) and *Sherbert* v. *Verner,* 374 U.S. 398, 404 (1963).

The federal *in forma pauperis* statute, despite Appellees' argument (Brief, p. 18), is not to the contrary. True, a federal *in forma pauperis* appeal may not be taken if it is frivolous or malicious. But this does not deny equal protection, since any federal appeal may be dismissed on such grounds. *Coppedge* v. *United States,* 369 U.S. 438

(1962); *Ellis* v. *United States*, 356 U.S. 674 (1957). The point is not *how* the proceeding is conditioned, but whether the conditions apply *equally*.

Appellees, by using such terms as "privilege," by attempting to limit *Griffin*, by deprecating the significance of divorce, and by claiming that the discrimination here is unintentional, concede the central fact of this case: Appellants are the victims of invidious discrimination. The very skill with which Appellees labor to avoid this issue attests to its importance. And the central weakness of Appellees' argument is that if they are successful, Connecticut will continue this discrimination.

The equal protection clause of the Fourteenth Amendment to the United States Constitution was designed to preclude just such a result.

IV.

Since the Challenged Statutes Involve Suspect Criteria and Impinge Upon Constitutional Rights, They May Be Justified Only by a Compelling State Interest; It Is Not Enough for Them to Be Reasonably Related to a Legitimate State Goal.

The State of Connecticut has discriminated against Appellants on economic grounds. By doing so, it has denied not only equal protection of the laws but also the due process guarantee of the right to petition for redress of grievances. Thus, the State is employing "suspect criteria" to deny a constitutional right. See *Shapiro* v. *Thompson*, —— U.S. ——, 22 L. Ed. 2d 600, 615 (1969), and Mr. Justice Harlan's dissent at 22 L. Ed. 2d 629-630. Such action can

only be justified by "a *compelling* governmental interest." *Shapiro* v. *Thompson* at 22 L. Ed. 2d 615; see also, *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942), *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944), *Carrington* v. *Rash,* 380 U.S. 89, 96 (1965), *Harper* v. *Board of Elections,* 383 U.S. 663 (1966), *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967).

Appellees have not shown a compelling interest in barring Appellants for Connecticut Courts. Indeed, Appellees argue (Brief, p 8) that Connecticut " . . . is attempting to solve the problem of access to her courts by the poor." If this be true, it is hardy consistent with a compelling interest to exclude Appellants.

Appellees claim (Brief, p. 15) that they need only show a "rational relationship to a legitimate state interest" in order to bar Appellants from the courts. They claim, further, that (Brief, p. 16) a compelling state interest need be shown only

> " . . . when the state is a party and can directly affect the outcome of a case but that need does not exist in civil actions where the state does not directly participate."

Thereby, Appellees seek to distinguish, *inter alia, Shapiro* v. *Thompson, supra, Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966) and *Carrington* v. *Rash,* 380 U.S. 89 (1965).

But in each of these cases the state or its agents occupied the precise role here occupied by Appellees, who are Connecticut's agents. Further, the issue was the same: whether the state could deny certain benefits by arbitrarily

classifying citizens. These cases, then, are precisely in point. Before Appellees may deny Appellants access to the courts they must show a compelling state interest.

There is no such interest. If Connecticut wishes to deter frivolous litigation, it must do so for the rich and poor alike. Connecticut has not done so, although there are means available. If the state wishes to raise new revenue, it may do so, just as it may protect its present finances. But no new revenue will flow from barring these Appellants from the courts, and no present revenue will be lost by admitting them. At most, Connecticut may have to pay an undetermined but relatively small amount to effect service of process on behalf of Appellants. As to this, this Court has said in *Shapiro* v. *Thompson,* —— U.S. ——, 22 L. Ed. 2d 600, 614 (1969):

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot be an independent ground for an invidious classification.

Appellees' attempt to justify their discrimination is identical to that rejected by the Supreme Court of Oregon in the recent decision in *O'Connor* v. *Mullins,* —— Oreg. ——,

— P.2d —— (No. 40550, Aug. 28, 1969). There the Court held it had inherent power to waive filing fees for a plaintiff who wished to institute a suit for replevin and damages. It said:

> The fear has been expressed that, if the poor are allowed to litigate without paying the "deterring" court fees, they will inundate the courts with frivolous cases. This attitude overlooks the fact that the poor are most often ignorant of judicial processes, except insofar as they are the victims of such processes. Not only do they not know what remedies exist for the wrongs done them and not only are they ignorant of the procedures for availing themselves of these remedies, but their attitude toward the courts is one of fear.
>
> The experience of the small claims courts should demonstrate how groundless is the fear that the poor will abuse the judicial process. The original purpose of these courts was to help the poor to recover small claims without the aid of counsel. According to Professor Samore, that purpose has failed miserably. Samore, *supra,* citing Kronheim, XX Va. L. Weekly, *Dicta* No. 7 (1967) and Murphy, *Small Claims—The Forgotten Courts?* 25 Legal Aid Briefcase 167 (1967). These courts are used more to prosecute claims against the poor than claims by them.
>
> Speaking of the invalidity of the hypothesis that fees serve a useful purpose in discouraging litigation, Lee Silverstein, director of research and publications, National Legal Aid and Defender Association, said in his article *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases, supra* at 25-26:

"A second practical disadvantage of the proposal [that the court system be completely free to litigants, as are administrative agencies, schools, libraries, parks, etc.] is that merely eliminating court fees and costs would not be enough to make the courts accessible to the poor. Some system is needed to cover the auxiliary expenses of litigation, such as publication fees, bond premiums, fees of investigators and expert witnesses, and, in some jurisdictions, court stenographers. More important, the system must assure that an attorney is provided for the litigant. Further, even if all the financial requisites of litigation are either eliminated or subsidized, many good claims and defenses will go unasserted, especially by the poor. This is because the courts typically hold sessions Monday through Friday between 9 and 5 (or shorter hours) at courthouses in central business districts. The typical workingman or woman must forego at least half a day's pay to make use of the courts, and possibly more, depending on such factors as the type of work he does, how far he must travel, how long he has to wait for his case to be called, whether the case is continued, whether he has to appear once to file the case and another time for trial, etc."

V.

This Case Is Appropriate for Judicial Resolution.

Appellees argue that (Brief, p. 2) " . . . essential to our democracy is a tripartite system of government where no branch interferes with the activities of another." Appellees conclude therefore that this Court should defer to the Connecticut legislature. But the Connecticut legislature is not a branch of government coordinate with this Supreme Court. That position is occupied by the Congress of the United States.

The arrogance of Appellees' position lies as well in the omniscience ascribed to the Connecticut Legislature. Despite Appellees' argument, it may be doubted that "The legislature is best equipped to answer questions about socio-economic factors" (Appellees' Brief, p. 9). But even if true this would not mean other bodies must abdicate their constitutional responsibilities. As woefully inept (in Appellees' view) as this Court may be, it nevertheless must discharge its duties. In arrogating exclusive competence to the Connecticut legislature, Appellees have gone beyond reason and authority.

There is also a certain hypocrisy in Appellees' contention (Brief, p. 9) that Connecticut is attempting

> " . . . through innovation and analysis to find the best possible criteria (sic) to base an in forma pauperis statute. The alternatives are many; proper selection is necessarily a function of the legislative process."

In point of fact, the Connecticut legislature has slammed the door on "innovation and analysis." At its last ses-

sion, the legislature was "unable to agree," to use Appellees' phrasing (Brief, p. 8), on an *in forma pauperis* bill. More precisely, the legislature totally rejected any such legislation. This is the "innovation and analysis" of which Appellees are so enamored.

Ironically, the two instances of "innovation" cited by Appellees involve action by Connecticut executive agencies, not the legislature. This is true of the grants to New Haven Legal Assistance Association. And it is equally true of the proposed Welfare Legal Services project. (See Appellees' Brief, p. 8 and Appendix B.) Neither of these efforts is particularly "innovative,"* and neither helps Appellants. More importantly, as *executive* action, they constitute an indictment of the legislature's inaction.

Appellees' reliance upon the legislature is thus misguided. Equally misguided is their disdain for the capacity of courts to engage in "innovation and analysis." That capacity, which Appellees arrogate to the legislature, may be found as well and perhaps more often in the judiciary.

There is nothing complex or insoluble in the whole host of problems which Appellees conjure up to confound this Court. (See Appellees' Brief, pp. 6 and 7.) Similar problems, although far more difficult, were posed in *Gideon* v.

---

*Note that the welfare project allocates only $1000 to court costs. Thus, perhaps only fifteen *in forma pauperis* law suits would be possible. And only seventy-five clients will be served by the entire project at a prohibitively high cost of nearly $1000 per client. One wonders how Appellees can advocate such a program and yet criticize waiver of court costs as overly expensive. (See Appellees' Brief, pp. 14-15.) Further, there is gross inefficiency in requiring the Welfare Department to raise funds in order to pay fees charged by another state department. Common sense would dictate simply waiving those fees. Finally, all of this "innovation" simply duplicates existing services.

Wainwright, 372 U.S. 335 (1963). There, this court faced the legal complexities and the practical considerations involved in requiring states to appoint counsel for indigents. Even more complex problems were raised by the law and the realities of desegregation in *Brown* v. *Board of Education,* 347 U.S. 483 (1954) and the one-man-one-vote rule of *Baker* v. *Carr,* 369 U.S. 186 (1962). A court which could confront these cases need hardly flee before the straw men advanced by Appellees.

In any event, the problems posed by Appellants are peripheral to the basic issue: whether Connecticut may deny Appellants' rights. Appellees attempt to avoid the issue by saying that there are many ways to assure these rights, and the choice may be difficult. But this in effect concedes that the basic dispute is soluble. This Court, then, should so find, and order a solution. If the legislature at its next session wishes to adopt an alternative solution assuring Appellants' rights, it is free to do so.

As to this, the Court in *Suber* v. *Suber,* —— N.J. ——, —— A.2d —— (Docket No. M-2366-68, Superior Court of New Jersey for Union County, August 25, 1969) said, in ordering service of process as a matter of constitutional right for an indigent divorce plaintiff (p. 5, Memorandum of Opinion):

> "It has been urged that judicial restraint should be exercised in this case. It is argued that the legislature should handle this problem and this Court should not upset the court procedure under the aegis of equal protection.
>
> This Court would welcome legislative action in this area. But, in the absence of such action, this Court

> sees an injustice which must be remedied. This injustice is unconstitutional by today's standards . . . ,
>
> • • • • •
>
> A judgment in the amount of the costs in issue will be granted against the State. *This Court will leave to the State the question of administration. Which department of the State will pay the judgment is to its discretion.*"

This Court should pursue the course followed in *Suber* v. *Suber*, ordering immediate relief for Appellants. Connecticut would be free to "innovate and analyze" further, if it really wants to do so. But in the meantime, Appellants would not be barred from the courts simply because a state legislature is paralyzed by indecision.

Conclusion

Appellees' position is constructed of contrivances, devoid of credibility: They say a group may petition for redress of grievances but an individual may not. Somehow, they assert, discrimination is tolerable if unintentional. They would allow the wealthy to bring frivolous suits, but the poor are barred whether or not their suits have merit. And no compelling state interest for such discrimination need be shown if it saves money. Divorce, they claim, is a privilege barely nudging the scales of justice, and *Griffin* v. *Illinois* was decided in a vacuum, so that neither justice nor precedent has any relevance for women who, on whimsy, gaily contemplate the frivolity of divorce. And, lastly, these are not matters for the courts, since only a legislature can understand them.

Perhaps there is merit in the last contention. For clearly enough Appellees' position passes the understanding of laymen, like Appellants, who know little law but can recognize justice. As to justice, the Constitution speaks plainly enough. It guarantees due process, the right to petition for redress of grievances and equal protection of the laws. Yet even a layman can see that Appellees propose to deny these to Appellants.

And then there is Appellees' argument that Connecticut needs time to "innovate and analyze" the best ways to help Appellants. This seems little more than cynical dissembling in view of Connecticut's fixed legislative intention to do quite the opposite. There will be nothing new from the legislature. Connecticut's judiciary, too, has closed its doors with equal firmness to Appellants.

Thus, the simple, plain fact is that Appellants have been excluded from the Courts because of their poverty. And Connecticut intends to continue this exclusion, despite the Constitution and without regard for the consequences to Appellants' lives.

No nation founded on justice can tolerate such a practice. And no nation indifferent to such a practice can pretend to be just.

Respectfully submitted,

Arthur B. LaFrance, Esq.
Attorney for Appellants
College of Law
Arizona State University
Tempe, Arizona 85281

CERTIFICATE OF SERVICE

I, ARTHUR B. LAFRANCE, attorney for the plaintiffs, depose and say that on the 17th day of October, 1969, I served a copy of the foregoing Brief on the defendants by mailing copies first class postage prepaid to the following attorneys of record:

Robert K. Killian, Raymond J. Cannon, Edward J. Peters, 30 Trinity Street, Hartford, Connecticut.

ARTHUR B. LAFRANCE

Sworn to and subscribed before me, this 17th day of October, 1969.

OLIVIA H. BIRCHETT
Notary Public
My Commission Expires
January 24, 1972

[SEAL]

PETITION FOR RE-HEARING

FILE COPY

FILED
SEP 3 197
JOHN SEAVER, C

Supreme Court of the United States

OCTOBER TERM, 1970

No. 27

GLADYS BODDIE, BERTHA BARKER, ANN DeNICOLA, MARYANN DOZIER, BETTY ANN PEREZ, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,

Appellants,

v.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, CLERK OF THE SUPERIOR COURT OF CONNECTICUT FOR NEW HAVEN COUNTY; JUDGE JOSEPH S. LONGO, SUPERIOR COURT OF CONNECTICUT; JUSTICE JOHN P. COTTER, COURT ADMINISTRATOR, SUPREME COURT OF CONNECTICUT,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

APPELLANTS' BRIEF ON REARGUMENT

ARTHUR B. LaFRANCE, ESQ.
New Haven Legal
Assistance Association
Mailing Address:
College of Law
Arizona State University
Tempe, Arizona 85281

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	
I. Appellants Were Denied Equal Protection of the Laws When They Were Denied Access to the Courts Solely Because of Their Poverty	2
II. Appellants Were Denied Due Process of Laws When They Were Denied the Opportunity to Petition for Redress of Grievances	8
III. The Rationale for Relief in This Case May Be of a Limited Nature	14
CONCLUSION	16

TABLE OF CITATIONS

Cases:

Chambers v. Baltimore & Ohio R.R., 207 U.S. 148 (1970)	7
Dandridge v. Williams, 397 U.S. 471 (1970)	7, 8, 13
Flemming v. Nestor, 363 U.S. 603 (1960)	13
Goldberg v. Kelly, 397 U.S. 254 (1970)	9, 10, 11, 12, 14
Griffin v. Illinois, 351 U.S. 12 (1956)	2
Harris v. Harris, 424 F.2d 809 (D.C. Cir. 1970)	3
Lee v. Habib, 424 F.2d 891 (D.C. Cir. 1970)	2
Shapiro v. Thompson, 394 U.S. 618 (1969)	7
Skinner v. Oklahoma, 316 U.S. 535 (1942)	13
Sniadach v. Family Finance, 395 U.S. 337 (1969)	9, 10, 12, 13
Thompson v. Mazo, 421 F.2d 1156 (D.C. Cir. 1970)	4
Williams v. Illinois, ___ U.S. ___, 38 L.W. 4607 (1970)	5, 6, 8, 12

Page

Other Authorities:

New York's New Divorce Law, 5 Col.J. Law and Soc. Prob. 2:1, 16 (1969) 5

Note, 37 Fordham L Rev. 661 (1969) 4-5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 27

GLADYS BODDIE, BERTHA BARKER, ANN DeNICOLA, MARYANN DOZIER, BETTY ANN PEREZ, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,

Appellants,

v.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, CLERK OF THE SUPERIOR COURT OF CONNECTICUT FOR NEW HAVEN COUNTY; JUDGE JOSEPH S. LONGO, SUPERIOR COURT OF CONNECTICUT; JUSTICE JOHN P. COTTER, COURT ADMINISTRATOR, SUPREME COURT OF CONNECTICUT,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

APPELLANTS' BRIEF ON REARGUMENT

PRELIMINARY STATEMENT

This case was argued in December of 1969 and scheduled for reargument in June of 1970. Because nearly one year has elapsed since Appellants' Reply Brief was filed, this supplementary Brief is being submitted. The purpose is simply to call to the Court's attention various decisions and authorities arising during the past year and which have rele-

vance for this appeal. There is no intention of repeating here the comprehensive argument presented in Appellants' earlier Briefs.

ARGUMENT

I. APPELLANTS WERE DENIED EQUAL PROTECTION OF THE LAWS WHEN THEY WERE DENIED ACCESS TO THE COURTS SOLELY BECAUSE OF THEIR POVERTY.

Appellants' Brief argued (pp. 4-14) that Appellants were denied access to the courts of Connecticut simply because they were poor. A number of cases were then cited for the proposition that such discrimination contravenes the Fourteenth Amendment guarantee of equal protection of the laws. (See Brief, pp. 15-26.) The keystone case, of course, was *Griffin v. Illinois*, 351 U.S. 12 (1956).

Three recent decisions by the Court of Appeals for the District of Columbia Circuit lend support to Appellants' position. In each, the Court ultimately decided the issue before it on statutory grounds. But in each, the Court also noted the constitutional dimension of the case and implied that the result reached by statutory interpretation was compelled by the Constitution.

In *Lee v. Habib*, 424 F.2d 891 (D.C. Cir. 1970), an indigent defendant in an eviction proceeding sought a free transcript for appeal. In an opinion by Judge Wright, the Court said (p. 901):

> *The equal protection clause applies to both civil and criminal cases*; the Constitution protects life, liberty and property. It is the importance of the right to the individual, not the technical distinction between civil and criminal, which should be of importance to a court in deciding what procedures are constitutionally required in each case. Often a poor litigant will have more at stake in a civil case than in a criminal case.
>
> * * *

> *The right of all to have free access to the courts is basic to our democratic system.* It too cannot be conditioned on the payment of a fee where such a condition precludes the exercise of the right. Just as the pool tax bears no relation to voter qualification, a litigant's ability to pay for a transcript bears no relation to the justice of his position in a suit against him for eviction.
>
> Civil cases, of course, are different from criminal cases in that the state is not always the moving party. But this difference does not establish that the underlying principle of *Griffin* is completely inapplicable to civil cases. None of the equal protection cases discussed above has focused on the state's direct involvement in the criminal proceeding. Instead, the Court focused on the deficiencies of procedures whereby rich litigants received more thorough consideration of their appeals than did poor litigants. *Court procedures which of themselves invidiously discriminate between rich and poor impair guarantees of equal justice* which the Constitution was designed to protect. As *Shelley v. Kraemer* teaches, the Courts themselves may not be vehicles of discrimination. (Emphasis supplied.)

In *Harris v. Harris*, 424 F.2d (D.C. Dir. 1970), indigent plaintiffs sought to sue *in forma pauperis* for divorce. The lower court, in language reminiscent of Appellees' Brief (p. 11), had said (424 F.2d at 809):

> Here the parties have created a situation by their own act. They separated voluntarily. The taxpayers of the District of Columbia did not ask these two people to get married. They did not ask them to separate. They should not be made to underwrite the legal procedures to terminate the relationship.

The Court of Appeals, by MacKinnon, J., held (p. 811):

> Since Congress has prescribed certain statutory grounds for divorce it is beyond the authority of any court to impose additional grounds thereto. More

> specifically *it is not proper to use a divorce action as a ground for denying any such person access to a fair trial* . . . since under the statute one's ability to pay the costs of a divorce action is not a condition precedent to obtaining a divorce. . . . The *in forma pauperis* statute does not exclude divorce actions. It would be unthinkable that Congress would, by statute, permit well-to-do persons to obtain divorces and withhold that right from indigent persons. (Emphasis supplied.)

And in *Thompson v. Mazo*, 421 F.2d 1156 (D.C. Cir. 1970), the Court of Appeals held that an indigent defendant in a possessory action could not be denied a hearing because of inability to post a $3000 bond. In an opinion by Bazelon, C. J., the Court said (p. 160):

> Due process and equal protection considerations loom on the horizon when the diminution of rights is based on an economic classification not required by the ends to be served.[11]

---

[11]The state *can* set certain conditions for access to the courts. For example, it may screen out frivolous or dilatory actions, provided that the mesh of the screen is open enough not to snare those with valid claims whose only failing is penury. Another requirement . . . is that the plea of title be under oath. . . . *Any regulation which uses a financial hurdle simply to discourage suits, some of which might be taken in bad faith, is open to serious constitutional challenge*, since it would appear to operate from the doubtful premises that the rich are less likely than the poor to maintain frivolous actions. Cf. *Tate v. United States*, supra. (Emphasis supplied.)

These three cases, although ultimately decided on statutory grounds, bear directly on Appellants' equal protection argument. Certainly they rebut Appellees' contention that the *Griffin* line of cases applies only to "criminal" cases, or cases where the state is a moving party. And these cases recognize the great importance of access to the courts, as being "basic to our democratic system." See also, *Note*, 37

Fordham L. Rev. 661 (1969) and *New York's New Divorce Law*, 5 Col. J. Law and Soc. Prob. 2:1, 16 (1969).

Two other important decisions should be noted. Although they did not directly involve access to the courts, *Williams v. Illinois*, ___ U.S. ___ (1970) and *Dandridge v. Williams*, 397 U.S. 471 (1970) did involve application of the equal protection clause to indigents. Consequently, their rationale–if not their holdings–are of importance here.

In *Williams v. Illinois*, supra, an indigent prisoner was held beyond the maximum jail term because of his inability to pay a fine. This Court found a denial of equal protection, saying (38 L.W. 4607, 4608-4609):

> . . . when the aggregate imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination which rests on ability to pay, and accordingly, we reverse.
>
> * * *
>
> . . . once the state has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.
>
> It is clear, of course, that the sentence was not imposed upon appellant because of his indigency but because he had committed a crime. And the Illinois statutory scheme does not distinguish between defendants on the basis of ability to pay fines. But, as we said in *Griffin v. Illinois, supra*, "a law nondiscriminatory on its face may be grossly discriminatory in its operation" . . . . Here the Illinois statute as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. *On its face the statute extends to all defendants an apparently equal opportunity* for limiting confinement to the statutory maximum simply by satisfying a money

> judgment. *In fact this is an illusory choice for Williams or any indigent who, by definition, is without funds.* . . . By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment. (Emphasis supplied.)

This Court's language, referring to men in physical bondage, could apply with equal force to these Appellants, who are in social bondage. The relevance of *Williams* to this case was made ever greater by footnote 20 to the Court's opinion which dealt with court costs, the matter involved in the present proceeding, saying:

> . . . inability to pay court costs cannot justify imprisoning an indidgent beyond the maximum statutory term since the Equal Protection Clause prohibits expanding the maximum term specified by statute simply because of inability to pay.

The decision in *Williams* deals with the very type of discrimination posed here. This Court's opinion in *Williams* makes short shrift of Appellees' argument (Brief, p. 10) that a statute which is fair on its face, although discriminatory in effect, passes muster under the equal protection clause. The decision in *Williams* also rebuts Appellees' argument (Brief, pp. 6-7) that a holding for Appellants would involve intolerable administrative problems for the State, by saying (38 L. W. at 4609-4610):

> We are not unaware that today's holding may place a further burden on States in administering criminal justice. Perhaps a fairer and more accurate statement would be that new cases expose old infirmities which apathy or absence of challenge have permitted to stand. But the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo.

The only possible distinction between Appellants' case and *Williams* is that the latter is a "criminal" case. But, as noted above, and in Appellants' earlier Briefs, that is a distinction which lacks logic and authority. Further, if this Court had intended to limit the rationale of *Williams* to criminal cases, it could have done so by employing an appropriate constitutional guarantee other than equal protection, such as that prohibiting excessive fines and cruel and unusual punishment. United States Constitution, Amdt. VIII.

The decision in *Dandridge v. Williams*, 397 U.S. 471 (1970), while again not precisely in point, also lends support to Appellants' position. There, welfare recipients challenged State maximum grant limitations on equal protection grounds. This Court upheld such limitations. No denial of equal protection was found, since the case only involved "state regulation in the social and economic field, not effecting freedoms guaranteed by the Bill of Rights . . ." 397 U.S. at 484. Therefore, *Dandridge v. Williams* did not involve the more stringent equal protection test employed in *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Clearly, had a freedom guaranteed by the Bill of Rights been involved in *Dandridge*, a different result would have been reached. Such a freedom is involved here: the First Amendment guarantee of the right to petition for redress of grievances. The importance of this right has been recognized many times by this Court. Indeed, it was characterized as ". . . at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . ." in *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907). The point here is not to argue again the importance of this right (see Appellants' Brief, pp. 26-30), but simply to emphasize that the denial of that right makes Appellants' argument more compelling than the argument advanced in *Dandridge v. Williams*. Hence, Appellees must meet the more stringent test of *Shapiro v. Thompson*, not the lesser test of *Dandridge v. Williams*.

Even if this were not so, the test of *Dandridge v. Williams* would suffice to void the statute challenged here. There *was* minimal rationality for the maximum grant limitation, since it tended to equalize the positions of the working and nonworking poor, thus encouraging employment. In contrast, there is *no* rationality to barring the poor from the courts. (See Appellants' Brief, pp. 38-49). Indeed, doing so not only denies a constitutional right but, in addition, works a grievous hardship upon the poor. (See Appellants' Brief, pp. 24-26, 45-49).

In sum, the decisions construing the Equal Protection Clause since Appellants' last Brief strengthen materially Appellants' reliance on that clause.

Those lower federal courts which have considered the issue have all tended to support Appellants' position. And this Court's equal protection decisions–*Williams v. Illinois* and *Dandridge v. Williams*–are equally consistent with Appellants' argument. Indeed, only label-gamesmanship can distinguish *Williams v. Illinois*, under the cavil that "criminal" and "civil" cases have no relation to each other, though both are embraced by the equal protection clause. And while the result in *Dandridge v. Williams* may be distinguished, the rationale clearly favors these Appellants, who rely on First Amendment guarantees and challenge a statute totally lacking in rational basis.

II. APPELLANTS WERE DENIED DUE PROCESS OF LAWS WHEN THEY WERE DENIED THE OPPORTUNITY TO PETITION FOR REDRESS OF GRIEVANCES.

Appellants have argued earlier that the First and Fourteenth Amendments of the United States Constitution assure their right to petition for redress of grievances. (See Appellants' Brief, pp. 26-37.) They have been denied that right solely by reason of poverty. This constitutes a denial of due process of laws.

Support for Appellants' position may be found in two recent decisions of this Court: *Sniadach v. Family Finance*, 395 U.S. 337 (1969) and *Goldberg v. Kelly*, 397 U.S. 254 (1970). While neither case is precisely in point, both dealt with the due process assurance of a fair hearing for the poor. It is just such a hearing which has been denied these indigent Appellants.

In *Sniadach*, state law permitted a creditor to deprive a wage earner of income without a hearing. In *Goldberg v. Kelly*, state law permitted the welfare department to do the same to a welfare recipient. In the present case, state law permits a court to deprive these Appellants of the right to divorce and remarry without a hearing.

It may be said that here the Appellants have been deprived by their own act of marrying. And yet in *Sniadach* the debtor voluntarily contracted his debt. So also, in *Goldberg v. Kelly*, the welfare recipient voluntarily sought welfare assistance. The due process issue does not inhere so much in the individual's conduct as in that of the State.

Perhaps it may be argued that in *Goldberg v. Kelly* and *Sniadach* are distinguishable because there it was the State which acted against the individual. Yet clearly *Sniadach* involved action by a private party. And, in any event, there has been state action here: the legislature has said that Appellants may not dissolve their marriage without court action and the courts have denied relief *without a hearing.*

Yet, it may be contended that these Appellants seek a benefit-divorce-from the State, whereas the individuals in *Sniadach* and *Goldberg v. Kelly* sought to redress a grievance previously inflicted by the State. This approach would limit *Sniadach* and *Goldberg v. Kelly* to prior hearings: i.e., a hearing prior to the infliction of injury. But that is precisely what these Appellants seek, since the State has denied them a divorce because of poverty, both by legislative fiat and court action. And even if they are viewed as applying for a new right, under such a view the debtor in *Sniadach* may be viewed as merely seeking relief from a wage garnish-

ment, and the welfare recipient in *Goldberg v. Kelly* may be viewed as simply applying for welfare. Obviously, if there is a due process right to a fair hearing before rights are terminated, there must be a right to such a hearing on initial application. Appellants seek such a hearing.

It is important to emphasize that Appellants do not claim a constitutional right to divorce but only a right to petition for divorce. This has been denied them without a hearing just as surely as Sniadach's wages and Kelly's welfare benefits were denied. And Appellants' loss is the more serious. For Appellants have lost *all* opportunity to be heard, unlike *Sniadach* and *Goldberg v. Kelly*, where the Appellants could have obtained a hearing subsequent to their injury. Thus, Appellants assert the right to be heard involved in *Sniadach* and *Goldberg v. Kelly*, but in a more basic form, for they have been denied the right *first* to petition in order *then* to be heard.

Thus the rationale of *Sniadach* and *Goldberg v. Kelly* applies to this case. So also does the compelling concern reflected in those cases for the plight of the poor. This was reflected in Justice Douglas' discussion of the impact of garnishments on the poor in *Sniadach*, 395 U.S. at 340-341. It is perhaps more fully reflected in Justice Brennan's language from *Goldberg v. Kelly*, 397 U.S. at 261-262, 264. As Appellants have argued in their Brief (pp. 45-49), for the poor, divorce and remarriage are often the best means of achieving economic betterment and social stability. So viewed, barring Appellants from obtaining divorces is much like terminating welfare assistance. As this Court said in *Goldberg v. Kelly*, (397 U.S. 264-265):

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing and medical care. . . . Thus the crucial factor in this context —a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose government largesse is ended—is that termination of aid pending resolution

> of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.
>
> * * *
>
> From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal amlaise that may flow from a widespread sense of unjustified frustration and insecurity. . . . The same governmental interests which counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

The lanugage quoted above concerning welfare assistance could as easily have been written about divorce and remarriage for the poor.

Goldberg v. Kelly is also significant because it counters one of Appellees' most strongly urged arguments: that divorce and *in forma pauperis* litigation are mere privileges which the State may deny or condition at will. The following appears at 397 U.S. 261-262 in *Goldberg v. Kelly*:

> Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them.

> Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right'.

The conclusion is inescapable that important state benefits, whether they be called fundamental rights or mere gratuities, must be extended equally and fairly to all.

In *Goldberg v. Kelly* there were dissents by Chief Justice Burger and by Justices Black and Stewart. It may be worth emphasizing that the grounds for dissent there do not apply here. Chief Justice Burger dissented because H.E.W. regulations would have provided relief by July of 1970 and, further, complex matters of welfare administration are better determined by Congress and the States. Here, there is no complex interplay between state and federal governments and the Connecticut legislature–although it has had ample opportunity–denied the relief Appellants seek. Justice Black dissented because the Fourteenth Amendment was designed primarily for racial discrimination and did not authorize what might be viewed as judicial "legislation" in an area of mere gratuities. But here, by contrast, Appellants assert a First Amendment right which antedates the Reconstruction and which is as fundamental as free speech and assembly. And Justice Stewart dissented primarily because those existing proceduressof the state in *Goldberg v. Kelly* appeared to satisfy the minimal requirements of due process. In contrast, no hearing whatsoever was afforded Appellants; they were not even allowed to file their papers in court.

It would seem, then, that the due process rationale of *Sniadach* and *Goldberg v. Kelly* is applicable here. This is supported also by certain concurring opinions in other cases. Thus, in *Williams v. Illinois*, ___ U.S. ___, 38 L.W. 4607 (6/30/70), which was decided on equal protection grounds, Mr. Justice Harlan concurred on due process grounds, saying (38 L.W. at 4614):

> I, for one, would prefer to judge the legislation before us in this case in terms of due process, that is to determine whether it arbitrarily infringes a constitutionally protected interest of the petitioner.

By reference to *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) and *Flemming v. Nestor*, 363 U.S. 603, 611 (1960), he argued that there are limits to the presumption of constitutionality accorded a statute which denies a basic liberty, and even one which confers a non-contractual benefit under a social welfare scheme ". . . if the statute manifests a patently arbitrary classification, utterly lacking in rational classification." 38 L.W. at 4615. As Appellants have argued above and in their Brief (pp. 38-48), just such a classification is involved here. See also the concurring opinion of Mr. Justice Harlan in *Dandridge v. Williams*, 397 U.S. 471 (1970), re-emphasizing the nature of the proper due process test, and in *Sniadach v. Family Finance*, 395 U.S. 337 (1969), finding that the statute there did not meet the test.

Thus Appellants' suit lends itself well to a due process analysis. They have been denied the due process guarantees of a fair hearing as well as the right to petition for such a hearing. And the basis for this denial is a statute lacking even minimal rationality. Due process has clearly been denied.

A due process approach to this case does not involve merely a re-phrasing of Appellants' equal protection argument. The implications of an equal protection argument arguably reach to aspects of court procedures other than fees and, as well, to state fees other than those for court procedures. It may well be, then, that this Court would seek a narrower ground for granting relief. The due process clause affords such a basis. (See Part III of this Brief.)

III. THE RATIONALE FOR RELIEF IN THIS CASE MAY BE OF A LIMITED NATURE

Chief Justice Burger, dissenting in *Goldberg v. Kelly*, 397 U.S. 254 (1970) expressed a concern for the implications of the majority opinion. It may be appropriate, then, to note that the relief sought here need not involve unpredictable or far-reaching consequences for future litigation. A holding for Appellants may, instead, rest on quite narrow grounds.

It may be claimed, for example, that a holding for Appellants would necessitate a later decision assuring counsel or expert assistance in civil cases. Such a result is avoided by Appellants' due process argument, which is grounded on the explicit First Amendment guarantee of the right to petition for redress of grievances. There is no similar guarantee of civil counsel or expert assistance in civil cases.

In the altnerative, this Court chould hold as a matter of equal protection that a state may be compelled to equalize the opportunity to be heard, but not the varying resources of litigants who take unequal advantage of that opportunity. The latter is simply an impossibility. And the denial of the opportunity to be heard is a far more "final and disastrous" thing than failure to afford counsel once the opportunity to be head has been granted. See *Burns v. Ohio*, 360 U.S. 252, 258 (1959). This Court, in interpreting the equal protection clause, may properly limit it to matters of fundamental import, such as the right to be heard and to disparities created by the State, not by private litigants. As to other matters, the equal protection standard is either inapplicable or is met by the minimal showing required in *Dandridge v. Williams*, supra.

It may also be argued that waiving fees for court matters will compel waiving them for marriage licenses, dog licenses and all other state-franchised activities. But, again, this ignores Appellants' due process reliance on the First Amendment right to petition for redress of grievances. There is no constitutional guarantee which in similarly explicit language embraces state fees generally. And, as a matter of equal

protection, it seems clear that litigation, particularly that affecting marital status, is of greater social and constitutional significance than dog licenses. Waiving fees for court proceeding would seem a more imperative matter than waiving the minor revenue levies which states impose on luxuries, recreation and activities not of a fundamental nature.

Still another possible argument may be that Appellants' position would require waiving costs for all litigation, no matter how petty or frivolous, if brought by indigents. But Appellants' litigation involves matters of fundamental import. Further, it involves matters which the State *requires* be resolved by court order. And, as for frivolity, there is nothing to indicate that Appellants' divorce actions lack merit.

As a matter of due process, it would seem a denial of due process to require a citizen to go into court for certain matters and then bar him. And it would seem a denial of equal protection for a state benefit, so conditioned, to be available only to the wealthy. These considerations do not apply to most litigation, which may often be brought on a contingent fee basis, or may involve matters which are not required to be settled in court, or may raise issuessof petty significance.

As this discussion makes apparent, a due process analysis of Appellants' case permits a fairly precise, narrowly bounded holding, based on the explicit First Amendment guarantee of the right to petition for redress of grievances. Such a holding would have few implications for other state activities or fees, or for requiring the State to do more in civil litigation than waive fees. And even waiving fees might be required as a matter of due process only where the subject of litigation—as here—was itself constitutionally cognizable or was required by state law to be resolved in the courts.

In contrast, an equal protection approach has far broader implications. And yet it too may, if this Court desires, be appropriately limited along lines similar to those involved in a due process approach. This case involves the constitutionally guaranteed right of access to the courts, and the subject

of Appellants' suit is not only fundamental but cannot be settled privately. The application of the equal protection clause to such a case need not impel a similar application in other cases lacking these characteristics. Particularly is this so since the presence of a First Amendment right in this case means that the challenged statute must meet the more demanding test of *Shapiro v. Thompson*. In many other cases, the absence of this factor would permit a lesser standard, which a statute with only minimal rationality might satisfy.

CONCLUSION

Appellants have been denied not only the right to a minimally fair hearing on their divorce claims but even the right to *petition* for such a hearing. Yet such a right is unqualifiedly accorded all those wealthy enough to pay court costs. Whether measured by the First Amendment, coupled with the Fourteenth Amendment due process clause, or the equal protection clause standing alone, such a result is manifestly unconstitutional.

No other conclusion would seem tenable. The only impediment—if impediment there be—to sustaining Appellants' cause would be fear of the implications. With this in mind, Appellants have demonstrated that a holding in their favor may be narrowly based and drawn, limiting any implications for future litigation.

And yet, were this not so, even the most far-reaching of consequences would still not warrant denying what is otherwise just. This Court may wisely choose to act cautiously; but it has never confused caution with timidity. The many landmark decisions of this Court diminish this case, in comparison, to insignificance.

But the importance of this case to Appellants cannot be minimized. They have been subjected to invidious discrimination preventing them from governing—as do others—their marital affairs. Nothing could be more central to the very

fabric of Appellants' existences. And nothing could affect more profoundly their futures.

It is in these terms that the relief Appellants seek should be measured.

Respectfully submitted,

Arthur B. LaFrance, Esq.
Attorney for Appellants
Professor of Law
College of Law
Arizona State University
Tempe, Arizona 85281

FILE COPY

FILED
SEP 11 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 27

GLADYS BODDIE, *et al.*,
Appellants,

vs.

THE STATE OF CONNECTICUT, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF *AMICUS CURIAE* THE ATTORNEY GENERAL OF NEW JERSEY

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,
State House Annex,
Trenton, New Jersey, 08625.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel and on the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
INTEREST OF AMICUS CURIAE	1
ARGUMENT—The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution does not require a state to finance any of the expenses of civil litigation incurred by indigent parties	5
CONCLUSION	9

Cases Cited

Adoption of a Child by Ann White, In re (appeal pending in Superior Court, Appellate Division, Docket No. A-1549-69)	4
Barbier v. Connolly, 113 U. S. 27 (1885)	6
Dandridge v. Williams, 397 U. S. 471 (1970)	6, 8
Douglas v. California, 372 U. S. 353 (1963)	4-6
Dugger v. Dugger (appeal pending in Superior Court, Appellate Division, Docket No. A-1038-69)	4
Griffin v. Illinois, 351 U. S. 12 (1958)	4-6
Harper v. Virginia Bd. of Elections, 383 U. S. 663 (1966)	6
Knowlton v. Moore, 178 U. S. 41 (1900)	8
Kotch v. Board of River Pilot Commissioners, 330 U. S. 552 (1947)	6
Sanks v. Georgia (No. 28, 1970 Term)	1

PAGE

Stewart v. Stewart (appeal pending in Superior Court of New Jersey, Docket No. A-95-96) (argued February 17 and March 2, 1970) 4

Suber v. Suber (Docket No. M-2366-68) (appeal pending in Superior Court, Appellate Division, Docket No. A-376-69) 3,4

Swain v. Alabama, 380 U. S. 202 (1965) 6

Tigner v. Texas, 310 U. S. 141 (1940) 6

United States Constitution Cited

Fourteenth Amendment 5

Statutes Cited

L. 1951, ch. 348 2

N.J.R. 1:13-2 2

N.J.S.A. 22A:1-7 2

N.J.S.A. 22A:2-23 2

Other Authorities Cited

Note, Litigation Costs: The Hidden Barrier to the Indigent, 56 Geo. L. J. (1968):

516 4

Silverstein, Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases, 2 Valpariso U. L. Rev. (1967):

21, 25 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 27

GLADYS BODDIE, *et al.*,

Appellants,

vs.

THE STATE OF CONNECTICUT, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF *AMICUS CURIAE* THE ATTORNEY GENERAL OF NEW JERSEY

Interest of *Amicus Curiae*

On July 14, 1970 the Clerk of the Court wrote to the Executive Director of the Council of State Governments, stating that this case and *Sanks* v. *Georgia* (No. 28, 1970 Term) had been held over for reargument during the October, 1970 Term, and that the Court had invited states

directly interested in the cases to participate. The Attorney General of New Jersey reviewed the matter and determined that the issues presented have such a significant potential impact upon the State of New Jersey that a separate statement in the form of an *amicus curiae* brief should be filed.

Preliminarily, we note that New Jersey does not ordinarily require indigent civil litigants to pay filing fees as a prerequisite to the institution of a civil action. The New Jersey Legislature by enactment of Chapter 348 of the Laws of 1951 authorized waiver by the court of statutory fees payable by indigent litigants (N.J.S.A. 22A:1-7; see also N.J.S.A. 22A:2-23) and the Supreme Court of New Jersey, in the exercise of its rule-making power, has implemented this statutory authorization by providing that

> "[i]n any case in which a person is represented by a legal aid society, or Office of Economic Opportunity legal services project, the Office of Public Defender, or counsel assigned in accordance with these rules, all filing fees shall be waived by the clerk without the necessity of a court order." N.J.R. 1:13-2.

It is plain, however, that the arguments advanced by the appellants have broad ramifications with respect to other costs of civil litigation besides filing fees. The appellants' complaint specifically refers to publication costs as an expense of litigation they are unable to pay and requests that the State effect all necessary service of process without payment of costs by the appellants (A. 9-10). The appellants' reply brief filed with this Court relies extensively upon a recent unreported decision by a judge of the Superior Court of New Jersey, Chancery

Division (*Suber* v. *Suber* (Docket no. M-2366-68) (appeal pending in Superior Court, Appellate Division, Docket No. A-376-69)), which involved the State's obligation to pay publication costs for an indigent (Appellants' reply brief, pp. 8, 17-18). That brief further states that if the appellants prevail,

> ". . . Connecticut may have to pay an undetermined but relatively small amount to effect service of process on behalf of Appellants." (Appellants' reply brief, p. 12).

Additionally, the sweeping right of access to the courts, without regard to financial or other legitimate interests of the state, which the appellants urge the Court to read into the Due Process and Equal Protection clauses of the Fourteenth Amendment, would seem to imply not only an obligation on the part of a state to waive any filing fees payable to the state but also an affirmative duty to pay for any other civil litigation expenses which might result in a denial of access to the courts. The direction in which the appellants' argument ultimately leads is indicated by the quote from Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 Valpariso U. L. Rev. 21, 25 (1967), which is set forth at p. 14 of the reply brief:

> "[M]erely eliminating court fees and costs would not be enough to make the courts accessible to the poor. Some system is needed to cover the auxiliary expenses of litigation, such as publication fees, bond premiums, fees of investigators and expert witnesses and, in some jurisdictions, court stenographers. More important, the system must assure that an attorney is provided for the litigant."

In short, the ultimate thrust of appellants' arguments appears to be that a state has an obligation comparable to that established in the criminal area by such cases as *Griffin* v. *Illinois*, 351 U. S. 12 (1958) and *Douglas* v. *California*, 372 U. S. 353 (1963) to pay for the costs of civil litigation by indigent parties.

Some of the cases now on appeal in the New Jersey courts indicate the range of situations in which it may be contended that a state is compelled by the United States Constitution to pay for the costs of litigation between private parties. The issue in *Suber* v. *Suber*, *supra* and *Dugger* v. *Dugger* (appeal pending in Superior Court, Appellate Division, Docket No. A-1038-69) is whether the state is obliged by the Constitution to pay for the publication costs of an indigent plaintiff in a suit for divorce. The issue in *Stewart* v. *Stewart* (appeal pending in Supreme Court of New Jersey, Docket No. A-95-69) (argued February 17 and March 2, 1970) is whether the state has an obligation comparable to that established for criminal appeals by *Griffin* v. *Illinois*, *supra*, to pay for the cost of a transcript for use on appeal by an indigent civil litigant. *In re Adoption of a Child by Ann White* (appeal pending in Superior Court, Appellate Division, Docket No. A-1549-69) involves a contention that the state is required to waive adoption investigation and report fees where the party initiating the action for adoption is indigent. Many other litigation expenses which may confront an indigent civil litigant, such as investigatory expenses, discovery costs and deposits for security, also could be the subject of claims against the state to finance those costs. See Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 Geo. L. J. 516 (1968).

It is not possible to estimate with any accuracy the full financial burden which would be imposed upon the

State of New Jersey if the "equal protection" doctrines made applicable to criminal proceedings by such cases as *Griffin* and *Douglas* were transferred wholesale to the field of civil litigation. But there can be no doubt that to require the State to finance litigation expenses related to pretrial investigation, discovery, transcripts and even legal counsel for all indigent civil litigants would require expenditures amounting to millions of dollars. The extent of such expenditures would be still greater if the State were required to finance the costs of appeals by indigent civil litigants. It is clear, therefore, that the State of New Jersey has a substantial interest in this appeal.

ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution does not require a state to finance any of the expenses of civil litigation incurred by indigent parties.

Preliminarily, we observe that the appellees have set forth the pertinent authorities relating to the appellants' constitutional claims and have ably presented the arguments which support an affirmance of the decision of the three-judge District Court. It would be unnecessarily repetitious for those arguments to be repeated here so this brief is limited to comments which supplement the material already presented by the State of Connecticut.

The appellants place primary reliance upon the Equal Protection Clause of the Fourteenth Amendment in arguing for the recognition of a constitutional duty on the part of the states to finance the expenses of civil litigation by indigents. This Court has long recognized, however, that a denial of equal protection of the law is not

established simply because a law affects some individuals differently from others. *E.g. Barbier* v. *Connolly*, 113 U. S. 27 (1885); *Tigner* v. *Texas*, 310 U. S. 141 (1940); *Kotch* v. *Board of River Pilot Commissioners*, 330 U. S. 552 (1947); *Swain* v. *Alabama*, 380 U. S. 202 (1965); *Dandridge* v. *Williams*, 397 U. S. 471 (1970). Where a law on its face applies equally to all persons, as is true of provisions requiring the payment of litigation expenses, the burden of establishing a denial of equal protection is a particularly heavy one. See *Kotch* v. *Board of River Pilot Commissioners, supra*. Thus laws which on their face apply equally to all have been found to deny equal protection on the basis of wealth only in narrowly limited areas; viz., in criminal proceedings (*Douglas* v. *California, supra; Griffin* v. *Illinois, supra.*) and in the exercise of the franchise. *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663 (1966).

The extent of a state's power to grant or withhold relief from the consequences of poverty and to determine the manner in which funds devoted to this purpose shall be spent is well illustrated by this Court's decision last term in *Dandridge* v. *Williams, supra*, in which it sustained the constitutionality of the ceilings established by Maryland for welfare benefits. The effect of these ceilings was to deny any additional assistance with respect to the fifth or any succeeding child in a family. The regulation was challenged as denying equal protection to needy children in large families, by depriving them of the necessities of life made available to needy children of other families. The Court, however, was able to find a rational basis for the regulation ". . . in the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor." 397 U. S. at 486. It is clear, moreover,

the Court rejected any contention that a "compelling state interest" need be shown to justify the differences in treatment among welfare recipients resulting from a welfare system. Rather, it recognized that it was appropriate to judge the constitutionality of legislation designed to alleviate the plight of the poor by the same standards as other social welfare provisions such as child labor laws and laws limiting working hours:

> "For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' Williamson v. Lee Optical Co., 348 U. S. 483, 488, 99 L. Ed. 563, 572, 75 S. Ct. 461. That era long ago passed into history. Ferguson v. Skrupa, 372 U. S. 726, 10 L. Ed. 2d 93, 83 S. Ct. 1028, 95 ALR 2d 1347.
>
> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78, 55 L. Ed. 369, 377, 31 S. Ct. 337. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U. S. 61, 69-70, 57 L. Ed. 730, 734, 33 S. Ct. 441. 'A statutory discrimination will not be

> set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U. S. 420, 426, 6 L. Ed. 2d 393, 399, 81 S. Ct. 1101. 397 U. S. at 484-485.

This Court's refusal in *Dandridge* to give the equal protection clause an overly expansive interpretation no doubt reflected in part an awareness that the selection of revenue raising measures and the allocation of funds for the various functions entrusted to government to perform are generally considered to be a uniquely legislative responsibility. See *Knowlton* v. *Moore*, 178 U. S. 41, 100 (1900). It is the legislature which must determine the kind of taxes by which government revenues are to be obtained and the rates at which these taxes are to be set. Likewise, it is the legislature which must determine whether to use government revenues to build new schools, highways or prisons; whether to build new highways or beautify existing ones; whether to furnish additional specialists to assist classroom teachers or hire more classroom teachers; and whether to hire more government employees or raise the salaries of existing employees. Assistance for the poor involves difficult legislative judgments of a comparable nature.[1] Some think that a maximum amount of available resources should be devoted to education. Others consider low cost public housing or public health to be the highest priority item. Yet others assign primary importance to improving the legal services available to the poor. The allocation of government resources among these competing demands is generally committed to the legislature for their determination; for it is the legislative branch of government—and only that branch—which has the power to raise revenues and which is accountable to the people through the electoral process for the manner in which government revenues are spent. It would thus be inconsistent with the

proper allocation of responsibilities between the legislative and judicial branches of government and destructive of our federal system to read into the Equal Protection clause of the Fourteenth Amendment an inflexible requirement that the states finance the cost of civil litigation for indigents. Rather, the matter should be left for the legislative branches of government at the national, state and local levels.

CONCLUSION

For the reasons set forth above and in the brief of the appellees, it is respectfully submitted that the Court should affirm the decision of the three-judge District Court which granted the appellees' motion to dismiss.

Respectfully submitted,

GEORGE F. KUGLER, JR.
Attorney General of New Jersey

STEPHEN SKILLMAN
Assistant Attorney General
Of Counsel and on the Brief

FILE COPY

Supreme Court, U.S.
FILED
OCT 1 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 27

GLADYS BODDIE, et al.,
Appellants,

v.

THE STATE OF CONNECTICUT, et al.,
Appellees.

On Appeal from the United States District Court
for the District of Connecticut

APPELLEES BRIEF ON REARGUMENT

ROBERT K. KILLIAN
Attorney General

RAYMOND J. CANNON
Assistant Attorney General

30 Trinity Street
Hartford, Connecticut 06115

LEDGE PRESS, PRINTERS, HARTFORD

INDEX

SUBJECT MATTER

Page

Table of Authorities ii

Statement 1

Argument

I. Appellants Are Not Denied Due Process 2

II. Appellants Are Not Denied Equal Protection 4

III. Appellants Claim That The Relief In This Case May Be Of A Limited Nature 7

IV. Addendum To Section I C. Connecticut Is Experimenting With Innovative Concepts As It Develops In Forma Pauperis Procedures 8

Conclusion 9

TABLE OF AUTHORITIES

Cases: *Page*

Aiello v. *Commissioner of Welfare*, 260 N.E. 2d 662, (Mass. 1970) 8

Dandridge v. *Williams*, 397 U.S. 471 (1970) 5

Frederick v. *Schwartz*, 296 F. Supp. 1321, 1322 9

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 8

Harris v. *Harris*, 424 F. 2d 806 (1970) 2

In the Matter of Athen Carlton Garland et al, ____ F. 2d ____, (1970) 6

Laprease v. *Raymours Furniture Company, Inc.*, 70-CV-16 (1970) 3

Lee v. *Habib*, 424 F. 2d 891 (1970) 3

Sniadach v. *Family Finance Corporation of Bay View et al*, 395 U.S. 337 (1969) 3

Williams v. *Illinois*, ____ U.S. ____ (1970) 90 S. Ct. 2018, 38 L.W. 4607 4

Constitutional Provisions:

Fourth Amendment to the United States Constitution 3, 4

Tenth Amendment to the United States Constitution 9

Fourteenth Amendment to the United States Constitution 3, 4, 6

Statutes:

Federal

11 U.S.C. § 68(c)(2) 6

28 U.S.C. § 753, § 1915 3

28 U.S.C. § 1915a 8

§ 16-904a D. C. Code (1967) (79 Stat. 889) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 27

GLADYS BODDIE, et al.,
Appellants,

v.

THE STATE OF CONNECTICUT, et al.,
Appellees.

On Appeal from the United States District Court for the District of Connecticut

APPELLEES BRIEF ON REARGUMENT

STATEMENT

Appellants' brief on reargument cites several recent cases to support their claim that the plaintiffs are denied equal protection of the laws because of the Connecticut statute requiring entry fees and the auxiliary expenses incident to the institution of a divorce action.

In divorce actions the petitioners are required to pay not only the entry fee but also the expense of service, including publication where necessary. Due to the nature of divorce actions it may also be necessary to provide counsel for both plaintiffs and defendants.

I.

APPELLANTS ARE NOT DENIED DUE PROCESS.

Harris v. *Harris*, 424 F. 2d 806 (1970) cited by appellants held that divorce actions were within the framework of the statute permitting divorces in certain cases in the District of Columbia. The Court held that the in forma pauperis statute, as well as § 16-904a of the D. C. Code (1967) (79 Stat. 889) set forth the public policy as enacted by Congress to the effect that divorce statutes and the in forma pauperis act, 28 U.S.C., § 1915a, when read together, authorized divorces on statutory grounds.

> ". . . The public policy on any matter is primarily for the lawmakers and is to be ascertained by reference to the Constitution, statutes and court decisions and not from general considerations of supposed public interest. If a policy exists it may be used to resolve an uncertainty of law but it cannot override a statute. Muschany v. United States, 324 U.S. 49, . . ."

On the basis of the probability of the expense of publication costs in the *Parks* case considered by the Court together with the *Harris* case, the Court indicated that since these fees are not fixed by the Court they are not one of the costs covered by the in forma pauperis statute. The Court delayed decision until a record was presented with concrete facts because

> ". . . we do not consider that there is any certainty that this cost will arise or, if it does, what the cost will be, or that funds cannot be found by appellant to pay the reduced cost that would result from our prior suggestion. . . ."

As indicated by the plaintiffs, the *Harris* case decided the issue on statutory grounds.

The same is true in *Lee* v. *Habib*, 424 F. 2d 891 (1970) wherein the plaintiffs requested that the Court order a free transcript for the use of an indigent civil litigant on appeal. The Court held that under certain statutes the United States must pay for transcripts for indigent litigants allowed to appeal in forma pauperis. See 28 U.S.C. § 753, § 1915.

Lee was a possessory action in which the defendant obtained a judgment by default. *Lee* interposed certain legal and equitable defenses and the Appellate Court was asked to dismiss for failure to comply with certain procedural requirements. However, the Court at p. 940 said: "We do not hold that every civil case will require a transcript on appeal. We indicate no opinion as to whether one will be required in this case."

In note 59 — "To allow free transcripts for all civil litigants would only serve to foment unnecessary appellate litigation."

Recently the courts have had occasion to strike down certain state statutes as violative of the Fourth Amendment and Fourteenth Amendment. This has been especially true in those situations where an indigent has been subject to prejudgment confiscation of his wages, household property, or has been preemptorily deprived of his housing accommodations or similar situations. In the recent *Sniadach* case, 395 U.S. 337, the Court held that a prejudgment garnishment statute of Wisconsin violates the fundamental principles of due process. Likewise, *Laprease* v. *Raymours Furniture Company, Inc.*, 70-CV-16, decided (7/29/70) in the United States District Court for the Northern District of New York that statutes permitting prejudgment seizure of chattels by a

plaintiff in a replevin action without the prior order of a judge or a court of competent jurisdiction is unconstitutional in that it violates the search and seizure provisions of the Fourth Amendment, and it also violates the procedural due process requirements of the Fourteenth Amendment.

The foregoing cases and other of a like nature recognize the rights secured by the Fourth Amendment (searches and seizures) and the Fourteenth Amendment (deprivation of life, liberty or property, without due process of law).

The essential nature of a divorce is not consistent with the status of a right within the intendment of the Constitution.

II.

APPELLANTS ARE NOT DENIED EQUAL PROTECTION.

Contrary to claims of the appellants we submit that *Williams* v. *Illinois*, ____ U.S. ____ (1970) 90 S. Ct. 2018, 38 L.W. 4607, is not relevant to the problem here presented. Williams was convicted of petty theft and received the maximum sentence provided by state law: one year imprisonment and a $500.00 fine. At all times Williams was without funds and his petition to vacate the order requiring he remain in prison upon the expiration of his one year sentence because of non-payment of the fine and court costs was denied. He appealed to this Court. The Court held that

> ". . . the Illinois statute as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. . . ."

However, *Dandridge* v. *Williams*, 397 U.S. 471 (1970) is very relevant. There the Court upheld maximum grant limitations to welfare recipients regardless of the size of the family. The Court held:

". . . If this were a case involving government action claimed to violate the First Amendment guarantee of free speech, a finding of 'overreaching' would be significant and might be crucial. . . . But the concept of 'overreaching' has no place in this case. For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, . . .

". . . In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S. Ct. 337, 340, 55 L. Ed. 369. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70, 33 S. Ct. 441, 443, 57 L. Ed. 730. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393. . . .

". . . And it is a standard that is true to the principle

that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of wise economic or social policy. . . .

". . . It is enough that the State's action be rationally based and free from invidious discrimination. The regulation before us meets that test. . . ."

The basic reason for statutes requiring payment of entry fees in civil proceedings is to provide some revenue with which to support the judicial system. It is fair and equitable that some of the costs to support the system should be borne by those who make use of the available facilities. The Connecticut statutory fee of $45.00 for civil actions in the Superior Court is reasonable.

Attention is also called to No. 7476, In the Matter of Athen Carlton Garland et al., Bankrupts, ____ F. 2d ____, decided in the United States Court of Appeals for the First Circuit on July 10, 1970 wherein the Court affirmed the action of a referee in bankruptcy in refusing petitioners a discharge in bankruptcy because of failure to pay the $50.00 filing fees due to indigency. The Court in its opinion stated the fees charged are to be regulated so that the system as a whole will produce sufficient revenue to meet all costs. 11 U.S.C. § 68(c)(2)

". . . A bankruptcy discharge is not a fundamental right. Congress can, and has, concluded that it is desirable under certain circumstances that an individual be able to get clear of his debts and start afresh. It must have the right, however, to attach reasonable conditions to this privilege. . . ."

III.

APPELLANTS CLAIM THAT THE RELIEF IN THIS CASE MAY BE OF A LIMITED NATURE.

At page 14 of Appellants' Brief on Reargument, it states "It may be appropriate, then, to note that the relief sought here need not involve unpredictable or far-reaching consequences for future litigation". It is further stated that "This Court, in interpreting the equal protection clause, may properly limit it to matters of fundamental import, such as the right to be heard and to disparities created by the State, not by private litigants. As to other matters, the equal protection standard is either inapplicable or is met by the minimal showing required in *Dandridge* v. *Williams,* supra".

This argument is ambiguous and it is difficult to ascertain the intent of the appellants from the language used. As interpreted by us, the appellants are apparently claiming that divorce is a matter of "fundamental import" and a "guaranteed right" rather than a privilege extended by the Legislature. As stated at page 12 of Appellee's main brief, it was argued that no person has a vested "legal right" to a divorce.

Appellants further claim that indigent applicants for a divorce must be afforded counsel, particularly since the State requires that marriages be dissolved by Court order. Assuming that this be correct, it seems obvious in the event the fee charge is held unconstitutional then this Court must fix the standards or guidelines for the waiver of court entry fees, as well as the payment of the auxiliary expenses. If it is restricted to divorce matters, then in all probability further litigation would result in other areas of civil litigation.

As of this date this Court has not yet stated that the

Constitution requires that counsel be appointed at the expense of the government in any civil case.

Goldberg v. *Kelly*, 397 U.S. 254 (1970)
Aiello v. *Commissioner of Welfare*, 260 N.E. 2d 662, (Mass. 1970)

The federal statute, 28 U.S.C. § 1915, permits the Court to request an attorney to represent a person proceeding in forma pauperis in civil actions. The Court does not have authority to appoint counsel to represent such a litigant.

IV.

ADDENDUM TO SECTION I C. CONNECTICUT IS EXPERIMENTING WITH INNOVATIVE CONCEPTS AS IT DEVELOPS IN FORMA PAUPERIS PROCEDURES.

At page 8 of our main brief, appellees mention the experimentation with new procedures for the purpose of developing in forma pauperis proceedings. The State Welfare Department program previously mentioned is now organized in Connecticut and is financed on the basis of a three-year pilot study designed to evaluate the legal needs for persons on welfare. Connecticut is one of five states which has organized a legal service program in cooperation with the Meriden, Wallingford and Southington Bar Associations. The program is now in its second year and the statistics for legal services rendered for the period from November 3, 1969 to March 31, 1970 indicate that the organization handled 123 legal matters, including 45 divorce actions.

In addition, it is a matter of general knowledge that the New Haven Legal Assistance Association, which is interested in the present action, has also initiated a substantial number of divorce actions in the New Haven area. We

have no direct knowledge as to the source of funds used to pay the entry fees and the other expenses incident to such divorce actions. It is however logical to conclude that such expenses were paid by the plaintiffs themselves or the New Haven Legal Assistance Association, Inc.

See *Frederick* v. *Schwartz*, 296 F. Supp. 1321, 1322 (quoted — p. 9 of main brief)

CONCLUSION

In a democracy such as ours, legislative changes often consume considerable time to develop into statutory enactments. This process taxes the patience of many of our citizens. The founders of our nation foresaw the problem and in their wisdom enacted the Tenth Amendment.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
>
> Ratified December 15, 1791

Respectfully submitted,

ROBERT K. KILLIAN
Attorney General

By: RAYMOND J. CANNON
Assistant Attorney General

Attorneys for Appellees

30 Trinity Street
Hartford, Connecticut 06115

CERTIFICATE OF SERVICE

I, Raymond J. Cannon, attorney for the appellees, certify that on the 29th day of September, 1970, I served a copy of the foregoing Brief on the appellants by mailing air mail, postage prepaid, to the following attorneys of record:

Arthur B. LaFrance, Esq.
New Haven Legal Assistance Association
Mailing Address:
College of Law
Arizona State University
Tempe, Arizona 85281

Allan Ashman
Bettie McJunkin
1155 E. 60th Street
Chicago, Illinois 60637

George F. Kugler, Jr.
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625

Francis B. Burch
Attorney General of Maryland
1200 One Charles Center
Baltimore, Maryland 21201

J. Michael McWilliams
Assistant Attorney General of Maryland
1200 One Charles Center
Baltimore, Maryland 21201

RAYMOND J. CANNON
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06115

NO. 27

(PAPERS FILED AFTER REARGUMENT)

Memorandum on behalf of appellants filed on Dec. 3, 1970 (not printed)

Appellants' supplemental brief filed on Dec. 4, 1970 (not printed)

Memorandum submitted by appellees filed on Dec. 4, 1970 (not printed)

State of Georgia's reply to appellants' supplemental brief filed on Dec. 10, 1970 (Not printed)

Memorandum for U.S. as amicus curiae filed on Dec. 18, 1971. (Not Printed)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BODDIE ET AL. *v.* CONNECTICUT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 27. Argued December 8, 1969—Reargued November 17, 1970—Decided March 2, 1971

In view of the basic position of the marriage relationship in our society and the state monopolization of the means for dissolving that relationship, due process of law prohibits a State from denying, solely because of inability to pay court fees and costs, access to its courts to indigents who, in good faith, seek judicial dissolution of their marriage. Pp. 3–12.

286 F. Supp. 968, reversed.

HARLAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., and BRENNAN, J., filed concurring opinions. BLACK, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 27.—October Term, 1970

Gladys Boddie et al., Appellants, v. State of Connecticut et al. | On Appeal From the United States District Court for the District of Connecticut.

[March 2, 1971]

Mr. Justice Harlan delivered the opinion of the Court.

Appellants, welfare recipients residing in the State of Connecticut, brought this action in the federal district court for the District of Connecticut on behalf of themselves and others similarly situated, challenging, as applied to them, certain state procedures for the commencement of a litigation, including requirements for payment of court fees and costs for service of process, that restrict their access to the courts in their effort to bring an action for divorce.

It appears from the briefs and oral argument that the average cost to a litigant for bringing an action for divorce is $60. Section 52–259 of the Connecticut General Statutes provides: "There shall be paid to the clerks of the Supreme Court or the superior court, for entering each civil cause, forty-five dollars . . . ." An additional $15 is usually required for the service of process by the sheriff, although as much as $40 or $50 may be necessary where notice must be accomplished by publication.[1]

[1] App., at 9. The dollar figures are averages taken from the undisputed allegations of the complaint. The particular fee the sheriff receives from the plaintiff for service of process in any one case depends on the distance he must travel to effectuate service of process. Conn. Gen. Stats. § 52–261.

There is no dispute as to the inability of the named appellants in the present case to pay either the court fees required by statute or the cost incurred for the service of process. The affidavits in the record establish that appellants' welfare income in each instance barely suffices to meet the costs of the daily essentials of life and includes no allotment that could be budgeted for the expense to gain access to the courts in order to obtain a divorce. Also undisputed is appellants' "good faith" in seeking a divorce.

Assuming, as we must on this motion to dismiss the complaint, the truth of the *undisputed* allegations made by the appellants, it appears that they were unsuccessful in their attempt to bring their divorce actions in the Connecticut courts, simply by reason of their indigency. The clerk of the Superior Court returned their papers "on the ground that he could not accept them until an entry fee had been paid." App., at 9. Subsequent efforts to obtain a judicial waiver of the fee requirement and to have the court effect service of process were to no avail. *Ibid.*

Appellants thereafter commenced this action in the federal district court seeking a judgment declaring that Connecticut's statute and service of process provisions, "requiring payment of court fees and expenses as a condition precedent to obtaining court relief [are] unconstitutional [as] applied to these indigent [appellants] and all other members of the class which they represent." As further relief, appellants requested the entry of an injunction ordering the appropriate officials to permit them "to proceed with their divorce actions without payment of fees and costs." A three-judge court was convened pursuant to 28 U. S. C. § 2281, and on July 16, 1968, that court concluded that "a state [may] limit access to its civil courts and particularly in this instance, to its divorce courts, by the requirement of a filing fee or

other fees which effectively bar persons on relief from commencing actions therein." 286 F. Supp. 968, 972.

We noted probable jurisdiction, 395 U. S. 974 (1969). The case was heard at the 1969 Term and thereafter was set for reargument at the present Term. 399 U. S. 922 (1970). We now reverse.[2] Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit the State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

I

At its core, the right to due process reflects a fundamental value in our American constitutional system. Our understanding of that value is the basis upon which we have resolved this case.

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the

[2] Following colloquy at the oral reargument as to the possible availability of public or private funds to enable plaintiffs-appellants to defray the expense requirements at issue in this case, the parties submitted further papers on this score. Nothing in these materials would justify our declining to adjudicate the constitutional question squarely presented by this record.

rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."

American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

Such litigation has, however, typically involved rights of defendants—not, as here, persons seeking access to the judicial process in the first instance. This is because our society has been so structured that resort to the courts is not usually the only available, legitimate means of resolving private disputes. Indeed, private structuring of individual relationships and repair of their breach is largely encouraged in American life, subject only to the caveat that the formal judicial process, if resorted to, is paramount. Thus this Court has seldom been asked to view access to the courts as an element of due process. The legitimacy of the State's monopoly

over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy.

Recognition of this theoretical framework illuminates the precise issue presented in this case. As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society. See, *e. g., Loving* v. *Virginia,* 388 U. S. 1 (1967); *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923). It is not surprising, then, that the States have seen fit to oversee many aspects of that institution. Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.

Thus, although they assert here due process rights as would-be plaintiffs, we think appellants' plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a

realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum.

II

These due process decisions, representing over a hundred years of effort by this Court to give concrete embodiment to this concept, provide, we think, complete vindication for appellants' contentions. In particular, precedent has firmly embedded in our due process jurisprudence two important principles upon whose application we rest our decision in the case before us.

A

Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that "[w]herever one is assailed in his person or his property, there he may defend," *Windsor* v. *McVeigh*, 93 U. S. 274, 277 (1876). See *Baldwin* v. *Hale*, 1 Wall. 223 (1863); *Hovey* v. *Elliott*, 167 U. S. 409 (1897). The theme that "due process of law signifies a right to be heard in one's defence," *Hovey* v. *Elliott*, *supra*, at 417, has continually recurred in the years since *Baldwin*, *Windsor*, and *Hovey*.[3] Although "[m]any controver-

[3] See *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); *Sniadach* v. *Wilson*, 395 U. S. 337 (1969); *Armstrong* v. *Manzo*, 380 U. S. 545

sies have raged about the cryptic and abstract words of the Due Process Clause," as Mr. Justice Jackson wrote for the Court in *Mullane* v. *Central Hanover Tr. Co.*, 339 U. S. 306 (1950), "there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*, at 313.

Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, see *Windsor, supra*, at 278, or who, without justifiable excuse violates a procedural rule requiring the production of evidence necessary for orderly adjudication, *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 351 (1909). What the Constitution does require is "an *opportunity* . . . granted at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965) (emphasis added), "for [a] hearing appropriate to the nature of the case," *Mullane* v. *Central Hanover Tr. Co., supra*, at p. 313. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent

---

(1965); *Schroeder* v. *New York*, 371 U. S. 208, 212 (1962); *Best* v. *Humboldt Placer Mining Co.*, 371 U. S. 334, 338 (1963); *Covey* v. *Town of Somers*, 351 U. S. 141 (1956); *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306 (1950); *Anderson Natl. Bank* v. *Luckett*, 321 U. S. 233, 246 (1944); *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152–153 (1941); *Morgan* v. *United States*, 304 U. S. 1 (1938); *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463 (1934); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673 (1930); *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 423 (1915); *Londoner* v. *Denver*, 210 U. S. 373, 385–386 (1908); *Louisville & Nashville R. Co.* v. *Schmidt*, 177 U. S. 230, 236 (1900).

proceedings.[4] That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity or a hearing *before* he is deprived of any significant property interest,[5] except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.[6] In short, "within the limits of practicability," *Mullane* v. *Central Hanover Tr. Co., supra,* at 318, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause.

B

Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. Thus, in cases involving religious freedom, free speech or assembly, this Court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights.[7]

---

[4] Compare *Goldberg* v. *Kelly, supra,* with *In re Winship,* 397 U. S. 358 (1970). See also *Bowles* v. *Willingham,* 321 U. S. 503, 520–521 (1944).

[5] *Goldberg* v. *Kelly, supra; Sniadach* v. *Wilson, supra; Opp Cotton Mills* v. *Administrator, supra,* at 152–153 (1941); *United States* v. *Illinois Central R. Co., supra,* at 463; *Coe* v. *Armour Fertilizer Works, supra.*

[6] *Cafeteria and Restaurant Workers Union* v. *McElroy,* 367 U. S. 886 (1961); *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U. S. 594 (1950); *Fahey* v. *Mallonee,* 332 U. S. 245 (1947); *Bowles* v. *Willingham,* 321 U. S. 503 (1944); *Yakus* v. *United States,* 321 U. S. 414 (1944).

[7] *E. g., Schneider* v. *Town of Irvington,* 308 U. S. 147 (1939); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Bates* v. *Little Rock,* 361 U. S. 516, 527 (1960); *Sherbert* v. *Verner,* 374 U. S. 398 (1963).

No less than these rights, the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals. See *Mullane* v. *Central Hanover Tr. Co.*, 339 U. S. 306 (1950); *Covey* v. *Town of Somers*, 351 U. S. 141 (1956).

In *Mullane* this Court held that the statutory provision providing for notice by publication in a local newspaper, although sufficient as to beneficiaries of a trust whose interests or addresses were unknown to the trustee, was not sufficient notice under the Due Process Clause for known beneficiaries. Similarly *Covey* held that notice by publication in a foreclosure action, even though sufficient to provide a normal person with an opportunity for a hearing, was not sufficient where the defendant was a known incompetent. The Court expressly rejected an argument that "the Fourteenth Amendment does not require the State to take measures in giving notice to an incompetent beyond those deemed sufficient in the case of the ordinary taxpayer." *Id.*, at 146.

Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due.

III

Drawing upon the principles established by the cases just canvassed, we conclude that the State's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of

their marriages, and, in the absence of a sufficient countervailing justification for the State's action, a denial of due process.[8]

The arguments for this kind of fee and cost requirement are that the State's interest in the prevention of frivolous litigation is substantial, its use of court fees and process costs to allocate scarce resources is rational, and its balance between the defendant's right to notice and the plaintiff's right to access is reasonable.

In our opinion, none of these considerations is sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages. Not only is there no necessary connection between a litigant's assets and the seriousness of his motives in bringing suit,[9] but it is here beyond present dispute that appellants bring these actions in good faith. Moreover, other alternatives exist to fees and cost requirements as a means for conserving the time of courts and protecting parties from frivolous liti-

[8] At least one court has already recognized the special nature of the divorce action. Justice Sobel in a case like that before us took note of the State's involvement in the marital relationship:

"Marriage is clearly marked with the public interest. In this State, a marriage cannot be dissolved except by 'due judicial proceedings.' We have erected by statute a money hurdle to such dissolution by requiring in many circumstances the service of summons by publication . . . . This hurdle is an effective barrier to [plaintiff's] access to the courts. The loss of access to the courts in an action for divorce is a right of substantial magnitude when only through the courts may redress or relief be obtained." *Jeffreys* v. *Jeffreys*, 58 Misc. 2d 1045, 296 N. Y. S. 2d 74, 87 (Sup. Ct. 1968).

See also dissenting opinion of Judge Rives in *Brown* v. *Chastain*, 416 F. 2d 1012 (CA5 1969).

[9] We think *Cohen* v. *Beneficial Finance Corp.*, 337 U. S. 541 (1949), has no bearing on this case. Differences between divorce actions and derivative actions aside, unlike *Cohen*, where we considered merely a statute on its face, the *application* of this statute here operates to cut off entirely access to the courts.

gation, such as penalties for false pleadings or affidavits, and actions for malicious prosecution or abuse of process, to mention only a few. In the same vein we think that reliable alternatives exist to service of process by a state-paid sheriff if the State is unwilling to assume the cost of official service. This is perforce true of service by publication which is the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings. See *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306 (1950). We think in this case service at defendant's last known address by mail and posted notice is equally effective as publication in a newspaper.

We are thus left to evaluate the State's asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment. Such a justification was offered and rejected in *Griffin* v. *Illinois*, 351 U. S. 12 (1956). In *Griffin* it was the requirement of a transcript beyond the means of the indigent that blocked access to the judicial process. While in *Griffin* the transcript could be waived as a convenient but not necessary predicate to court access, here the State invariably imposes the costs as a measure of allocating its judicial resources. Surely, then, the rationale of *Griffin* covers this case.

IV

In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the *bona fides* of both appellants' indigency and desire for divorce are here beyond dispute. We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its

exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 27.—October Term, 1970

Gladys Boddie et al., Appellants, v. State of Connecticut et al.	On Appeal From the United States District Court for the District of Connecticut.

[March 2, 1971]

Mr. Justice Douglas, concurring.

I believe this case should be decided upon the principles developed in the line of cases marked by *Griffin* v. *Illinois*, 351 U. S. 12. There we considered a state law which denied persons convicted of a crime full appellate review if they were unable to pay for a transcript of the trial. The plurality opinion stated:

> "Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.*, at 19.

Griffin has had a sturdy growth. "Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." *Roberts* v. *LaVallee*, 389 U. S. 40, 42. See also *Williams* v. *Oklahoma City*, 395 U. S. 458; *Long* v. *District Court of Iowa*, 385 U. S. 192; *Draper* v. *Washington*, 372 U. S. 487. But *Griffin* has not been limited to securing a record for indigents who appeal their convictions. If the more affluent

have counsel on appeal, then counsel for indigents must be provided on appeal of a criminal conviction. *Douglas* v. *California*, 372 U. S. 353. The tie to *Griffin* was explicit. "In either case [*Griffin* or *Douglas*] the evil is the same: discrimination against the indigent." *Id.*, at 355.

In *Burns* v. *Ohio*, 360 U. S. 252, we invalidated a procedure whereby cases within the jurisdiction of the state supreme court would not be considered if a person could not pay the filing fee. In *Smith* v. *Bennett*, 365 U. S. 708, we held that requiring indigents to pay filing fees before a writ of habeas corpus could be considered in state court was invalid under the Equal Protection Clause. Here Connecticut has provided requirements for married couples to obtain divorces and because of filing fees and service of process one of the requirements is having the necessary money. The more affluent can obtain a divorce; the indigent cannot. This situation is comparable to *Burns* v. *Ohio*, and *Smith* v. *Bennett*.

The Due Process Clause on which the Court relies has proven very elastic in the hands of judges. "The doctrine which prevailed in *Lochner* [v. *New York*, 198 U. S. 45], *Coppage* [v. *Kansas*, 236 U. S. 1], *Adkins* [v. *Children's Hospital*, 261 U. S. 525], and [*Jay*] *Burns* [*Baking Co.* v. *Bryan*, 264 U. S. 504], and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." *Ferguson* v. *Skrupa*, 372 U. S. 726, 730. I would not invite its revival.

Whatever residual element of substantive law the Due Process Clause may still have (*Thompson* v. *Louisville*, 362 U. S. 199) it essentially regulates procedure. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337; *Wisconsin* v. *Constantineau*, 400 U. S. —. The Court today puts "flesh" upon the Due Process Clause by concluding that marriage and its dissolution are so important that an

unhappy couple who are indigent should have access to the divorce courts free of charge. Fishing may be equally important to some communities. May an indigent be excused if he does not obtain a license which requires payment of money that he does not have? How about a requirement of an onerous bond to prevent summary eviction from rented property? The affluent can put up the bond, though the indigent may not be able to do so. See *Williams* v. *Shaffer*, 385 U. S. 1037. Is housing less important to the mucilage holding society together than divorce? The examples could be multiplied. I do not see the length of the road we must follow if we accept my Brother HARLAN's invitation. The question historically has been whether the right claimed is "of the very essence of a scheme of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 325. That makes the test highly subjective and dependent on the idiosyncracies of individual judges as *Lochner*, *Coppage*, and *Adkins* illustrate.

The reach of the Equal Protection Clause is not definable with mathematical precision. But in spite of doubts by some,* as it has been construed, rather definite guidelines have been developed: *race* is one (*Strauder* v. *West Virginia*, 100 U. S. 303; *McLaughlin* v. *Florida*, 379 U. S. 184); *aliens* are another (*Takahashi* v. *Fish & Game Commission*, 334 U. S. 410); *religion* is another (*Sherbert* v. *Verner*, 374 U. S. 398); poverty is still another (*Griffin* v. *Illinois*, *supra*); and *class* or *caste* yet another. (*Skinner* v. *Oklahoma*, 316 U. S. 535).

The power of the States over marriage and divorce is of course complete except as limited by specific constitutional provisions. But could a State deny divorces to *domiciliaries* who were Negroes and grant to whites? Deny to resident aliens and grant to citizens? Deny to

*See Karst, Invidious Discrimination, 16 U. C. L. A. L. Rev. 716 (1969).

Catholics and grant to Protestants? Deny to those convicted of larceny and grant to those convicted of embezzlement?

Here the invidious discrimination is based on one of the guidelines: *poverty.*

An invidious discrimination based on poverty is adequate for this case. While Connecticut has provided a procedure for severing the bonds of marriage, a person can meet every requirement save court fees or the cost of service of process and be denied a divorce. Connecticut says in its brief that this is justified because "the State does not favor divorces; and only permits a divorce to be granted when those conditions are found to exist, in respect to one or the other of the named parties, which seem to the legislature to make it probable that the interests of society will be better served and that parties will be happier, and so the better citizens, separate, than if compelled to remain together."

Thus under Connecticut law divorces may be denied or granted solely on the basis of wealth. Just as denying further judicial review in *Burns* and *Smith,* appellate counsel in *Douglas,* and a transcript in *Griffin* created an invidious distinction based on wealth, so, too, does making the grant or denial of a divorce to turn on the wealth of the parties. Affluence does not pass muster under the Equal Protection Clause for determining who must remain married and who shall be allowed to separate.

SUPREME COURT OF THE UNITED STATES

No. 27.—October Term, 1970

Gladys Boddie et al., Appellants, *v.* State of Connecticut et al.	On Appeal From the United States District Court for the District of Connecticut.

[March 2, 1971]

Mr. Justice Brennan, concurring.

I join the Court's opinion to the extent that it holds that Connecticut denies procedural due process in denying the indigent appellants access to its courts for the sole reason that they cannot pay a required fee. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 895 (1961); *Goldberg* v. *Kelly*, 397 U. S. 254, 263 (1970). When a State's interest in imposing a fee requirement on an indigent is compared to the indigent's interest in being heard, it is clear that the latter is the weightier. It is an unjustifiable denial of a hearing, and therefore a denial of due process, to close the courts to an indigent on the ground of nonpayment of a fee.

But I cannot join the Court's opinion insofar as today's holding is made to depend upon the factor that only the State can grant a divorce and that an indigent would be locked into a marriage if unable to pay the fees required to obtain a divorce. A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. As a practical matter, if disputes cannot be success-

fully settled between the parties, the court system is usually "the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." *Ante,* at —. In this case, the Court holds that Connecticut's unyielding fee requirement violates the Due Process Clause by denying appellants "an opportunity to be heard upon their claimed right to a dissolution of their marriages" without a sufficient countervailing justification. *Ante,* at —. I see no constitutional distinction between appellants' attempt to enforce this state statutory right and an attempt to vindicate any other right arising under federal or state law. If fee requirements close the courts to an indigent he can no more invoke the aid of the courts for other forms of relief than he can escape the legal incidents of a marriage. The right to be heard in some way at some time extends to all proceedings entertained by courts. The possible distinctions suggested by the Court today will not withstand analysis.

In addition, this case presents a classic problem of equal protection of the laws. The question which the Court treats exclusively as one of due process inevitably implicates considerations of both due process and equal protection. Certainly, there is at issue the denial of a hearing, a matter for analysis under the Due Process Clause. But Connecticut does not deny a hearing to everyone in these circumstances; it denies it only to people who fail to pay certain fees. The validity of this partial denial, or differentiation in treatment, can be tested as well under the Equal Protection Clause.

In *Griffin* v. *Illinois,* 351 U. S. 12 (1956), we held under the Equal Protection Clause as well as the Due Process Clause that a State may not deny a free transcript to an indigent, where the transcript is neces-

sary for a direct appeal from his conviction. Subsequently, we have applied and extended that principle in numerous criminal cases. See, *e. g., Eskridge* v. *Washington State Board of Prison Terms & Paroles,* 357 U. S. 214 (1958); *Burns* v. *Ohio,* 360 U. S. 252 (1959); *Smith* v. *Bennett,* 365 U. S. 708 (1961); *Coppedge* v. *United States,* 369 U. S. 438 (1962); *Lane* v. *Brown,* 372 U. S. 477 (1963); *Draper* v. *Washington,* 372 U. S. 487 (1963); *Rinaldi* v. *Yeager,* 384 U. S. 305 (1966); *Long* v. *District Court,* 385 U. S. 192 (1966); *Roberts* v. *LaVallee,* 389 U. S. 40 (1967); *Gardner* v. *California,* 393 U. S. 367 (1969). The rationale of *Griffin* covers the present case. Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to rich and poor alike. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to indigent plaintiffs altogether. Where money determines not merely "the kind of trial a man gets," *Griffin* v. *Illinois, supra,* at 19, but whether he gets into court at all, the great principle of equal protection becomes a mockery. A State may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee. Cf. *Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966). In my view, Connecticut's fee requirement, as applied to an indigent, is a denial of equal protection.

SUPREME COURT OF THE UNITED STATES

No. 27.—October Term, 1970

Gladys Boddie et al., Appellants, *v.* State of Connecticut et al.	On Appeal From the United States District Court for the District of Connecticut.

[March 2, 1971]

Mr. Justice Black, dissenting.

This is a strange case and a strange holding. Absent some specific federal constitutional or statutory provision, marriage in this country is completely under state control, and so is divorce. When the first settlers arrived here the power to grant divorces in Great Britain was not vested in that country's courts but in its Parliaments. And as recently as 1888 this Court in *Maynard* v. *Hill*, 125 U. S. 190 (1888), upheld a divorce granted by the Legislature of the Territory of Oregon. Since that time the power of state legislatures to grant divorces or vest that power in their courts seems not to have been questioned. It is not by accident that marriage and divorce have always been considered to be under state control. The institution of marriage is of peculiar importance to the people of the States. It is within the States that they live and vote and rear their children under laws passed by their elected representatives. The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain, and dissolve marriages. The power of the States over marriage and divorce is complete except as limited by specific constitu-

tional provisions. *Loving* v. *Virginia*, 388 U. S. 1, 7–12 (1967).

The Court here holds, however, that the State of Connecticut has so little control over marriages and divorces of its own citizens that it is without power to charge them practically nominal initial court costs when they are without ready money to put up those costs. The Court holds that the state law requiring payment of costs is barred by the Due Process Clause of the Fourteenth Amendment of the Federal Constitution. Two members of the majority believe that the Equal Protection Clause also applies. I think the Connecticut court costs law is barred by neither of those clauses.

It is true, as the majority points out, that the Court did hold in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), that indigent defendants in criminal cases must be afforded the same right to appeal their convictions as is afforded to a defendant who has ample funds to pay his own costs. But in *Griffin* the Court studiously and carefully refrained from saying one word or one sentence suggesting that the rule there announced to control rights of criminal defendants would control in the quite different field of civil cases. And there are strong reasons for distinguishing between the two types of cases.

Criminal defendants are brought into courts by the State or Federal Government to defend themselves against charges of crime. They go into court knowing that they may be convicted, and condemned to lose their lives, their liberty, or their property, as a penalty for their crimes. Because of this great governmental power the United States Constitution has provided special protections for people charged with crime. They cannot be convicted under bills of attainder or ex post facto laws. And numerous provisions of the Bill of Rights—the right to counsel, the right to be free from coerced confessions, and other rights—shield defendants in state

courts as well as federal courts. See, *e. g., Benton* v. *Maryland,* 395 U. S. 784 (1969); *Duncan* v. *Louisiana,* 391 U. S. 145 (1968); *Malloy* v. *Hogan,* 378 U. S. 1 (1964); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). With all of these protections safeguarding defendants charged by government with crime, we quite naturally and quite properly held in *Griffin* that the Due Process and Equal Protection Clauses both barred any discrimination in criminal trials against poor defendants who are unable to defend themselves against the State. Had we not so held we would have been unfaithful to the explicit commands of the Bill of Rights, designed to wrap the protections of the Constitution around all defendants upon whom the mighty powers of government are hurled to punish for crime.

Civil lawsuits, however, are not like government prosecutions for crime. Civil courts are set up by government to give people who have quarrels with their neighbors the chance to use a neutral governmental agency to adjust their differences. In such cases the government is not usually involved as a party, and there is no deprivation of life, liberty, or property as punishment for crime. Our Federal Constitution, therefore, does not place such private disputes on the same high level as it places criminal trials and punishment. There is consequently no necessity, no reason, why government should in civil trials be hampered or handicapped by the strict and rigid due process rules the Constitution has provided to protect people charged with crime.

This distinction between civil and criminal proceedings is implicit in *Cohen* v. *Beneficial Indus. Loan Corp,* 337 U. S. 541 (1949), where we held that a statute requiring some, but not all, plaintiffs in stockholder derivative actions to post a bond did not violate the Due Process or the Equal Protection Clause. The *Cohen* case is indistinguishable from the one before us. In *Cohen,* as here,

the statute applied to plaintiffs. In both situations the legal relationships involved are creatures of the State, extensively governed by state law. The effect of both statutes may be to deter frivolous or ill-considered suits, and in both instances the State has a considerable interest in the prevention of such suits, which might harm the very relationship the State created and fostered. Finally, the effect of both statutes may be to close the state courts entirely to certain plaintiffs, a result the Court explicitly accepted in *Cohen*. See *id.*, at 552. I believe the present case should be controlled by the Court's thorough opinion in *Cohen*.

The Court's suggested distinction of *Cohen* on the ground that the Court there dealt only with the validity of the statute on its face ignores the following pertinent language:

> "It is urged that such a requirement will foreclose resort by most stockholders to the only available judicial remedy for the protection of their rights. Of course, to require security for the payment of any kind of costs, or the necessity for bearing any kind of expense of litigation, has a deterring effect. But we deal with power, not wisdom; and we think, notwithstanding this tendency, *it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met.*" *Id.*, at 552. (Emphasis added.)

Rather *Cohen* can only be distinguished on the ground that it involved stockholders' suit, while this case involves marriage, "an interest of basic importance in our society." Thus the Court's opinion appears to rest solely on a philosophy that any law violates due process if it is unreasonable, arbitrary, indecent, deviates from the fundamental, is shocking to the conscience, or fails to meet other tests composed of similar words or phrases equally lacking in

any possible constitutional precision. These concepts, of course, mark no constitutional boundaries and cannot possibly depend upon anything but the belief of particular judges, at particular times, concerning particular interests which those judges have divined to be of "basic importance."

I do not believe the wise men who sought to draw a written constitution to protect the people from governmental harassment and oppression, who feared alike the king and the king's judges, would have used any such words or phrases. Such unbounded authority in any group of politically appointed or elected judges would unquestionably be sufficient to classify our Nation as a government of men, not the government of law of which we boast. With a "shock of the conscience" test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test wilfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief, or his politics. I believe the only way to steer this country towards its great destiny is to follow what our Constitution says, not what judges think it should have said.

For these reasons I am constrained to repeat what I said in *Williams* v. *North Carolina*, 325 U. S. 226, 271–274 (1945):

> "I cannot agree to this latest expansion of federal power and the consequent diminution of state power over marriage and marriage dissolution which the Court derives from adding a new content to the Due Process Clause. The elasticity of that clause necessary to justify this holding is found, I suppose, in the notion that it was intended to give this Court unlimited authority to supervise all assertions of state and federal power to see that they comport

> with our ideas of what are 'civilized standards of law.'
>
> . . . . .
>
> ". . . This perhaps is in keeping with the idea that the Due Process Clause is a blank sheet of paper provided for courts to make changes in the Constitution and the Bill of Rights in accordance with their ideas of civilization's demands. I should leave the power over divorces in the states."

See also *In re Winship*, 397 U. S. 358, 377 (1970) (BLACK, J., dissenting).

One more thought about the Due Process and Equal Protection Clauses: neither, in my judgment, justifies judges in trying to make our Constitution fit the times, or hold laws constitutional or not on the basis of a judge's sense of fairness. The Equal Protection Clause is no more appropriate a vehicle for the "shock the conscience" test than is the Due Process Clause. See, *e. g.*, my dissent in *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 675–680 (1966). The rules set out in the Constitution itself provide what is governmentally fair and what is not. Neither due process nor equal protection permit state laws to be invalidated on any such nonconstitutional standard as a judge's personal view of fairness. The people and their elected representatives, not judges, are constitutionally vested with the power to amend the Constitution. Judges should not usurp that power in order to put over their own views. Accordingly, I would affirm this case.